Filed 7/30/19 P. v. Phipps CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. NAPOLEON DAJON PHIPPS et al., Defendants and Appellants.	E065254 (Super.Ct.No. FWV1102433) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING [NO CHANGE IN JUDGMENT]

THE COURT

The court has reviewed the petition for rehearing filed July 22, 2019. The petition is denied. The opinion filed in this matter on July 9, 2019, is modified as follows:

On page 32, the paragraph that begins, "Because we conclude the encounter . . . ," change the word "magistrate" to "trial court." The paragraph should read:

Because we conclude the encounter between Officer Diaz and defendants was consensual, we need not determine whether the officer had reasonable suspicion to detain them. The trial court properly denied the motions to suppress.

On pages 83-84, add footnote No. 25 at the end of the paragraph that begins, "As already noted, . . ." and ends, ". . . their claim of error has been forfeited." The paragraph and footnote should read:

As already noted, a defendant may challenge on appeal "any instruction given, refused, or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (§ 1259.) "But '[a] party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial.'" (*People v. Buenrostro* (2018) 6 Cal.5th 367, 428.) Because neither defendant requested the trial court instruct on causation, and neither objected the instructions given did not adequately address the legal issues fairly raised by the evidence, their claim of error has been forfeited.[25]

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[25] In a petition for rehearing, Phipps argues he was not required to timely interpose an objection to the absence of an instruction on causation because the trial court had a sua sponte duty to give one. (See *People v. Tate* (2010) 49 Cal.4th 635, 697, fn. 34.) But the trial court has a sua sponte duty to instruct on proximate cause only when causation is at issue. (*People v. Cervantes* (2001) 26 Cal.4th 860, 866-874; *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590-591; see Bench Notes to CALCRIM Nos. 240, 520 [proximate cause instruction must be given when there are multiple potential causes].) As the trial court noted below, there was only one cause of Anthony's death—a bullet fired from Phipps's revolver. The prosecutor tried this case on multiple *theories* of culpability for homicide, but the evidence established only one cause of death. Because the trial court did not have a sua sponte duty to instruct on proximate causation, defendants were required to object to the absence of such an instruction and their failure to do so forfeits their claim of error.

There is no change in the judgment.

McKINSTER
Acting P. J.

We concur:

MILLER
J.

RAPHAEL
J.

Filed 7/9/19 P. v. Phipps CA4/2 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. NAPOLEON DAJON PHIPPS et al., Defendants and Appellants.	E065254 (Super.Ct.No. FWV1102433) OPINION

APPEAL from the Superior Court of San Bernardino County. Mary E. Fuller, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed in part with directions; affirmed in part with directions.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant Napoleon Dajon Phipps.

Sharon G. Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant Christopher Patrick Wilson.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton, Daniel Rogers, Adrianne S. Denault and Christopher Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants Napoleon Dajon Phipps (Phipps) and Christopher Patrick Wilson (Wilson) appeal from their convictions for robbery, murder, attempted murder, and shooting at an occupied motor vehicle. Wilson also appeals from his additional convictions for being a felon in possession of a firearm.

Broadly speaking, defendants argue: (1) the trial court erred by denying their motions to suppress evidence; (2) the trial court erred by excluding exculpatory evidence; (3) the trial court erred by admitting expert testimony from a gang expert, and the evidence to support gang enhancements and a gang special circumstance was insufficient; (4) sufficient evidence does not support Wilson's conviction for attempted murder; (5) the trial court committed various instructional errors; (6) the trial court erred at sentencing; and (7) the errors cumulatively require reversal. The People concede some of the claims of sentencing error, and concede remand is necessary for the trial court to consider whether to strike Wilson's five-year sentence enhancement for a prior serious felony conviction.

We reverse for insufficient evidence Wilson's conviction on count 7 for attempted murder. We also agree with defendants the trial court erred by not instructing the jury that grossly negligent discharge of a firearm is a lesser included offense of shooting at an occupied motor vehicle; reverse defendants' convictions on count 5; and remand for the

trial court to reduce the convictions to the lesser included offenses and resentence defendants, unless the People elect to retry defendants on the greater offense within the statutory period. In addition, on remand the trial court shall: (1) correct Phipps's abstract of judgment to reflect the accurate sentence for attempted murder on count 7 of life in state prison with a mandatory minimum parole period of 15 years; (2) reduce Phipps's firearm sentence enhancement on count 7 from 25 years to life to 20 years in state prison; (3) correct Wilson's abstract of judgment to reflect he and Phipps are jointly and severally liable for the restitution award for count 1; and (4) determine in the first instance whether to exercise its discretion under recent statutory amendments to strike sentence enhancements for firearm use and whether to strike Wilson's five-year sentence enhancement for having suffered a prior conviction for a serious felony offense.

In all other respects, the judgments are affirmed.

I.

PROCEDURAL BACKGROUND

Following a jury trial, defendants were convicted of two counts of second degree robbery (Pen. Code,[1] § 211, counts 1, 3); one count of shooting at an occupied motor vehicle (§ 246, count 5); one count of first degree murder of Anthony Junius (Anthony)[2] (§ 187, subd. (a), count 6); and one count of attempted first degree murder of Marcus

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[1] All undesignated statutory references are to the Penal Code.

[2] To avoid confusion, we will refer to Anthony Junius and Marcus Junius by their first names. We mean no disrespect in doing so. (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1287, fn. 2.)

Junius (§§ 664, 187, subd. (a), count 7). Wilson was also convicted on three counts of being a felon in possession of a firearm. (§ 12021, subd. (a)(1), counts 2, 4, 8.) The jury also found true all enhancement allegations, to wit, multiple gang (§ 186.22, subd. (b)(1)(C), (b)(1)(A), (b)(4)(B)) firearm (§ 12022.53, subds. (b)(1), (c), (d), (e)(1)), and special circumstance allegations (§ 190.2, subd. (a)(21), (22)), and found true that Wilson suffered a prior conviction for a serious or violent felony (§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), and a prior serious felony (§ 667, subd. (a)(1)).

The trial court sentenced Phipps to state prison for 102 years to life without the possibility of parole, plus 17 years four months. Wilson was sentenced to state prison for 124 years to life without the possibility of parole, plus 47 years eight months.

Defendants timely appealed.

II.

FACTS

A. Prosecution Evidence.

1. August 19, 2011 robbery of Andy's Market.

On August 19, 2011, around 5:40 p.m., "two young men" robbed a liquor store on North Grove Avenue in Ontario. The two men took all the money that was in the cash register (between $400 to $500), cigarettes, and a bottle of vodka. A few weeks later, the store's cashier reviewed a photographic lineup and identified Wilson as "100 percent" the person who pointed a gun at his head during the robbery and identified Phipps "90 percent" as the second person involved in the robbery. When interviewed later, after the shooting at the Circle K, Phipps admitted to participating in the robbery.

2. August 23, 2011 robbery of Ontario Gas and Food.

On the evening of August 23, 2011, around 7:00 p.m., two men robbed a gas station convenience store on East Fourth Street in Ontario. The men took money from the cash register (between $30 to $40). Almost two weeks later, the cashier identified Wilson from a photographic lineup as the man who pointed a gun at him during the robbery, but he was unable to identify the second man involved. When interviewed later, after the shooting at the Circle K, Phipps admitted to participating in the robbery.

3. September 5, 2011 shooting at Circle K.

a. The shooting.

In the early morning hours on September 5, 2011, Earz Dudley[3] (Dudley) arrived at a Circle K[4] with Anthony, Anthony's cousin Marcus (Dudley knew him as "Little Rele"), Eddie Smith (Smith), and Germane or Jermaine Braddock (Braddock) (Dudley knew him as "B") in a rented Kia SUV (SUV). Braddock was the driver, and Dudley was in the passenger seat. Earlier that evening, Dudley had taken a handgun from

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[3] Dudley was a reluctant witness and only appeared because he was under subpoena. Throughout his testimony, Dudley qualified his answers by saying, "I don't remember." He believed his life was at risk by testifying, but he had not received any specific threats.

Dudley testified he had bad eyesight and had been smoking and drinking the evening before the shooting. He said he was not sure "how it went, how it played out."

[4] The Circle K was located in a shopping center at the corner of Vineyard Avenue and D Street in Ontario. The store was on the small part of an L-shaped building. The front door faced east, with parking directly in front. There were additional parking spaces on the north side of the store. The east parking and north parking were separated by an island, and a driver would have to make a loop driving in a northwest direction to get from the former to the latter.

Anthony and placed it on the floorboard of the SUV for safekeeping. The men drove to the Circle K to buy beer and parked on the north side of the store. Dudley entered the store, but he was unable to purchase the beer because it was too close to 2:00 a.m. Dudley walked back to the SUV.

Just then, Miranda Timken (Timken) arrived at the Circle K, driving her Chevy Malibu (Malibu), with Latrice Nash (Nash), Wilson, and Phipps.[5] She parked in a space on the eastside of the store, by the front doors. Timken saw the SUV parked on the side of the Circle K. Dudley returned to the store to buy cigars, noticed the Malibu, and entered the store. Timken got out of her car and entered the store as Dudley walked out; he held the door open for her.

Wilson exited the driver's side of the Malibu. Phipps got out of the rear passenger door and stood next to the car. As Dudley walked out of the store, Wilson said, "What the fuck you looking at, man. Where you from?"[6] Dudley ignored Wilson and walked

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[5] Timken had driven to the same Circle K to buy cigarettes earlier that evening, around 9:00 p.m. She was unsure if she had been driving the second time they arrived at the store. Video footage showed it was actually Wilson driving the Malibu when it arrived at 2:00 a.m.

Timken testified she had known Wilson for a few months and had been dating him for a few weeks. She did not know about Wilson's gang ties, and she never asked him about his tattoos. Timken had only recently met Phipps. She had not seen any guns up to that point, and she did not see guns on the floorboard of her car.

[6] Dudley testified he used to go by the street name "Ant Dogg." He had previously been a member of the Pasadena Denver Lane Bloods gang (PDL), but he was no longer a member at the time of the shooting. Dudley knew Anthony was a member of the Squiggly Lane Bloods gang (Squiggly), which is a rival of PDL.

Dudley testified that when one gang member asks another gang member "where you from," it is probably a hostile question and "maybe they're banging on each other."

back to the SUV. When he got back to the SUV, he said, "Let's go," "[l]et's get out of here," and "[t]his man is tripping." Anthony then hopped out of the backseat of the SUV.

While Dudley was walking back to the SUV, Wilson started to pull the Malibu out of the parking spot, and Phipps walked east within the parking lot to the rear of the Malibu. At the same time, Shunnanee Sanders (Sanders) drove her white Toyota Corolla (Corolla) into the east side parking lot at the front of the store. Sanders had to wait before she could park because Wilson was driving out of the parking lot in the wrong direction and nearly hit her car. As Sanders parked, she and her passenger Yatshica Johnson (Johnson) saw the SUV parked to the right of the storefront and saw two people standing around it. The men were helping a third man get into or out of the SUV. Before they could get out of the car, Sanders heard gunshots, and Johnson heard what she thought were firecrackers popping. Timken heard the gunshots from inside the store. Nash entered the store at that time. As Sanders started to pull out of the parking space, she heard a bullet hit the trunk of her car and another bullet hit another part of her car (she learned later it was the roof). Sanders did not see where the bullets were coming from. As Wilson drove the Malibu over to the location of the SUV, Sanders sped away from the Circle K parking lot, drove around the corner and stopped in front of a Ramada Inn to call the police.

Dudley saw the Malibu drive around in the direction of the SUV, heard two or three gunshots and saw flashes coming from the Malibu.[7] Dudley heard someone say something about a gun and "watch out!" Dudley ducked down and grabbed Anthony's gun from the floorboard of the SUV, fired back while still in the passenger seat, then ran to a wall and continued to fire until the gun was empty.[8] During the shooting, Marcus ran to the front of the Circle K, entered the store, then ran back.

Dudley then ran back to the SUV and saw Anthony on the ground. Dudley tried to pick Anthony up but was unable to. He got into the SUV and drove off. Wilson gave chase. While waiting for the police to arrive, Sanders saw the SUV being followed by the Malibu. The windows of the Malibu were down, and Sanders heard yelling, taunting, mock gunshots, and laughing directed at her. Dudley eventually eluded the Malibu, and he drove to West Covina or Azusa. He threw his shirt and the gun into a trashcan, and he and the other men separated.

When Timken walked out of the Circle K, her car was gone. As she and Nash walked around the corner, Timken saw what appeared to be a dead body, lying on the ground. She did not call 911 and, instead, walked away. She tried calling Wilson, but he never responded.

The Malibu returned to the Circle K parking lot mere moments after the shooting, followed soon thereafter by a police unit.

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[7] Sanders saw the Malibu pull alongside where the SUV was parked, but she did not see anyone get out of the Malibu.

[8] On cross-examination, Dudley testified he only fired from inside the SUV.

b. The investigation.

Officer Diaz arrived at the Circle K approximately two minutes after the initial 911 call of "shots heard." When he pulled into the parking lot, he saw a black Malibu stopped along the north side of the store. Phipps got out of the driver's door of the Malibu, started talking to Officer Diaz, and jumping up and down in an animated fashion. Phipps yelled, "Go get them." Wilson then exited the front passenger side of the Malibu. Both men walked to the back of the Malibu, and Phipps said his friend, "Thomas," had been shot. Officer Diaz noticed Wilson's arm was bleeding from what appeared to be a gunshot. Officer Diaz then saw a third man on the north side of the Circle K. The man was lying on the ground and appeared to be bleeding from his head. Phipps said Thomas had been shot by four heavily tattooed Hispanic males, driving a Ford Expedition. Officer Diaz observed a semiautomatic handgun and a revolver on the front passenger floorboard of the Malibu. He also observed blood on the inside the driver's side door. Neither defendant told Officer Diaz they had acted in self-defense or that they had a weapon.

Sanders told an officer that she believed the first shots came from the Malibu when it was behind her vehicle, as it drove around to the location of the SUV. Sanders said that, after she had parked next to the Ramada Inn, the SUV drove by with the Malibu following it. About three minutes later, she saw the Malibu drive by a second time in the opposite direction, and she heard the driver (or one or more of the occupants) mock her by saying, "Pow, pow, pow." Johnson told an officer that when Sanders first tried to park in front of the Circle K, a car almost hit them. She saw the same car "swerve in front of

the SUV and start shooting." Johnson heard two or three gunshots, ducked down, then heard another two or three more.

When interviewed by police, Timken said she and Wilson had been dating for four months. She also said she had loaned Wilson her Malibu five or six times Phipps was with Wilson at the time.

Dudley told Detective Marquez he had been a member of PDL but was "on parole" and was no longer gang "banging." Dudley said Anthony was a member of Squiggly, a rival of PDL.

Anthony received a gunshot wound to the left side of his head, but the bullet did not exit. A pathologist opined the manner of death was homicide.

4. Gang expert testimony.

Detective Devey of the Ontario Police Department testified gangs claim territory as a safety zone by putting up graffiti and making their claim to the territory known through criminal acts. Gangs are very possessive of their territory and defend it through assaults, threats, shootings, and/or stabbings. Tattoos identify people as gang members to both friends and rivals alike, express pride in the member's claim, and intimidate crime victims. Gang tattoos must be earned. Colors are also significant to some gangs. Crips gangs, such as the 4th Street Hustlas, associate with the traditional color of blue, but they also wear lime green. Both defendants wore lime green shirts during the trial. Blood

gangs usually associate with the color red, and Ontario does not have a strong presence of Blood gangs.[9]

Detective Devey testified the two robberies were committed in territory claimed by the 4th Street Hustlas. The gang was an ongoing organization with roughly 40 documented members and many more undocumented ones. Detective Devey routinely received information from other officers who investigated crimes attributed to the gang. The gang's signs or symbols are related to the former Florida Marlins and San Francisco Giants baseball teams. The initial "F" from the Florida Marlins related to 4th Street, and the initials for the San Francisco Giants, when reversed, represent "F" for 4th and "S" for street. Members also have tattoos and wear clothing with a dollar symbol or a four-leaf clover. Although Blood and Crips gangs are historic rivals, the 4th Street Hustlas are not rivals of all Blood gangs. Detective Devey testified, "now it's common to see them associating."

The primary activities of any gang, including the 4th Street Hustlas, are committing thefts, narcotics sales, weapons possession, robberies, violent assaults, and murders. Members of the 4th Street Hustlas individually and collectively engaged in a pattern of criminal activity. Detective Devey had personally spoken to members of the gang, who said they were aware of crimes committed by fellow members. He expected

[9] Detective Devey was not an expert on PDL or its rival, Squiggly. Whereas Dudley testified he was no longer a member of the PDL, Devey opined Dudley was an active member of PDL at the time of the shooting, and Anthony was an active member of Squiggly.

active members of the gang would know their gang was engaged in a pattern of criminal activity, especially if they themselves participated in those crimes.

Detective Devey identified three documented members of the 4th Street Hustlas, and indicated they had been convicted of possession of a firearm, murder, and attempted robbery. He also identified the tattoos worn by the three members as being related to the 4th Street Hustlas.

Based on his training and experience, Detective Devey opined Wilson was an active member of the 4th Street Hustlas because of his tattoos and the fact he committed crimes with another member in the gang's territory. Detective Devey identified a photograph of Wilson wearing a Florida Marlins hat. Wilson had been previously stopped while riding a bicycle in the gang's territory. The officer who performed the stop documented Wilson's gang tattoos. Detective Devey testified Wilson had many of the same or similar tattoos as the three documented members of the 4th Street Hustlas that he had previously identified.

Based on his training and experience, Detective Devey also opined Phipps was an active member of the 4th Street Hustlas because of his tattoos, the crimes he committed in this case, "as well as speaking to other gang investigators," reviewing field investigation (FI) cards, and "other reports." As with Wilson, Detective Devey testified Phipps had the same or similar tattoos as the three documented members of the 4th Street Hustlas. Detective Devey identified Phipps in photographs with other members of the gang, wearing the gang's colors and throwing up the gang's signs. Photographs taken of Phipps after he was arrested showed he was wearing jeans with green insignias on the

back pockets and he had green studs on his belt, which was consistent with the colors used by the gang.

In response to hypothetical questions, Detective Devey opined the two robberies, the murder of Anthony, the attempted murder of Marcus, and the shooting at the Corolla were all committed for the benefit of, at the direction of, or in association with a criminal street gang.

B. Defense Evidence.

1. Phipps.

Phipps testified and admitted he robbed Andy's Market and the Ontario Gas and Food. However, he retracted his prior statement to the police that Wilson had participated in the robberies. Instead, he claimed a man named "Aaron" held his (Phipps's) revolver in both robberies. Phipps had purchased the revolver a few days before the first robbery. He testified Aaron was not a member of the 4th Street Hustlas; nobody told Phipps to commit the robberies or what stores to rob; and he did not intend to benefit anyone else when he committed them. Phipps claimed the robberies were impromptu. In both instances, Aaron took Phipps's revolver just before the robbery. And both times Phipps kept all the cash taken during the robberies and did not share with Aaron. He also denied that he stole vodka during the second robbery.

Phipps testified the photographs of him identified by the prosecution's gang expert were taken when he was about 13 years old. He admitted to having been a member of the 4th Street Hustlas from about the age of 13 to 18 years old, but at the time of the shooting he was no longer an active member. He testified he got most of his tattoos before he

turned 18 years old and claimed his dollar sign, "God forgives, Hustlas don't," and four-leaf clover tattoos were not related to the gang. To show that he was no longer active in the gang, Phipps did not participate in its activities, he did not hang out with active members or congregate in its territory, and he did not tag (graffiti) walls. Phipps testified he had known Wilson for about seven years before the shooting, but they did not hang out regularly. He denied Wilson was a member of the 4th Street Hustlas and testified Wilson's tattoos were not for the gang.

Phipps admitted that on the night of the shooting, he was carrying his fully loaded revolver, explaining he had been shot when he was 16 years old and again when he was 19 years old. Earlier that day, Phipps had purchased another gun, a semiautomatic handgun. That evening, he, Wilson, Timken, and Nash were at a gathering or "kickback" of between 10 and 15 people. Wilson had invited Phipps to go out. Timken picked up Phipps at his house around 7:00 p.m., and they drove to the gathering in Timken's Malibu. Phipps tried to sell the semiautomatic handgun at the gathering, but nobody was interested. Phipps had a couple drinks, and the group left the gathering between 1:00 and 1:40 a.m. in Timken's vehicle. Wilson was driving. Phipps put the semiautomatic handgun on the floorboard of the backseat but kept the revolver on his person. They planned to stop at the Circle K to buy cigarettes, then go home. Phipps was seated in the backseat behind the front passenger. When they arrived at the Circle K, Phipps saw a dark colored SUV to the side of the building. He did not see anyone standing around or seated inside the SUV.

Phipps testified that when they parked in front of the Circle K, Timken got out of the vehicle and walked into the store. Dudley walked past and looked inside the car. Phipps did not hear Dudley say anything, and Phipps said nothing to him. Wilson got out of the vehicle. Phipps did not hear Wilson say anything as he was getting out of the car. Phipps also exited the vehicle and walked east through the parking lot toward Vineyard Avenue, while he texted his girlfriend.

Phipps stated that he heard someone start shooting, and he thought he was going to die. He did not see a gun, but two bullets flew past him. He was facing away from the Circle K, and it felt like the bullets were coming from behind. Phipps ducked and ran a few steps forward. He then turned around, reached for his revolver, and fired back. Phipps did not intend to kill anyone, and he did not specifically aim at anyone. He saw one person wearing a white T-shirt and another person wearing a red T-shirt outside the SUV. The person in the white shirt appeared to be running in the direction of Phipps, and the one in the red shirt was standing near the door of the SUV with his hands raised toward his chest area. Phipps thought the man in the red shirt was pointing a gun at him. Phipps fired all five bullets from the revolver in a matter of seconds and then ran to the east side (or Vineyard Ave. side) of the building near a Subway and Yoshinoya restaurant. Phipps looked back at the Circle K and saw the man in the white shirt run into the store and then run back to the SUV. He did not see the Corolla or intend to shoot at it. He did not know that he had hit anyone after he fired the gun.

Phipps testified that after the shooting was over, he got back inside the Malibu, which was now on Vineyard Avenue. Wilson was driving, and Phipps noticed Wilson

had a gunshot wound to his arm and there was blood everywhere. Phipps had not seen Wilson handle a gun. Phipps did not retrieve the semiautomatic handgun from the backseat floorboard until after the shooting. The gun may have already been jammed before the shooting happened. Phipps did not call 911. Wilson drove back to the front of the apartment complex where the gathering had taken place, which was just down the street from the Ramada Inn. Phipps saw what appeared to be the SUV on the roadway, but he and Wilson did not follow it. He denied seeing the Corolla at the Ramada Inn and denied saying anything to Sanders.

At the apartment complex, Phipps tried to figure out what had happened. Phipps and Wilson then switched seats, and Phipps drove them back to the Circle K to find Timken and Nash. He passed the Ramada Inn on the way back to the Circle K. When they arrived, he saw Anthony on the ground. Phipps then drove toward the west of the building when a police car pulled behind them. He testified it was Officer Diaz who implied the shooters were Hispanic males, and he merely agreed. Phipps denied he or Wilson told the officer there were four shooters with tattoos.

Phipps did not tell any officer he had a gun or that he had used it in self-defense because he did not trust the police. Although he admitted to the robberies, Phipps did not think he would be believed if he said he had acted in self-defense during the shooting. He did not intend or plan to shoot or kill anyone at the Circle K, and nobody told him to shoot or "flank" someone there. He denied telling officers that Wilson had fired a gun or that Wilson had yelled out "Ontario Crips." Phipps also denied telling Detective Marquez that he and Wilson chased the SUV to get its license plate number.

Phipps introduced testimony about PDL from an officer with the Pasadena Police Department. PDL, previously known as the Pasadena Devil Lane Bloods, was formed in the early 1980s as a branch of the Los Angeles Devil Lanes. PDL was active on the day of the shooting with over 200 documented members. Its members wore red and hats for the Pittsburg Pirates baseball team. PDL claimed territory in the City of Pasadena, including two parks. They were rivals of Crips gangs in Alta Dena and Hispanic gangs in Pasadena. Squiggly, an offshoot of the Alta Dena Denver Lane gang, was another rival.

PDL and Squiggly had an ongoing dispute, and there were shootings between the two gangs in and around the Pasadena area. The officer had never known members of those rival gangs to hang out with each other. The Circle K in Ontario was not in territory claimed by PDL. The officer did not know if PDL had rivals in the Inland Empire. He testified that, if a member of one gang goes into another gang's territory and he looks at the girlfriend of a member of the gang that claimed the territory, it would be sign of disrespect and could lead to violence. A gang member who traveled outside their territory would likely be armed.

2. Wilson.

Wilson did not testify. He presented testimony from an officer that the cashier of the Ontario Gas and Food identified one of the robbers as a Black male, approximately six feet tall, 200 pounds, medium build, wearing a gray hoodie, holding a silver handgun. He identified the second robber as a Black male, approximately five feet 10 inches tall, 180 pounds, medium build, and wearing a gray hoodie. The officer who interviewed the cashier of the Andy's Market testified the cashier identified one of the robbers as a Black

male, five feet nine inches tall, 160 pounds, wearing a gray hooded sweatshirt with a blue "Element" logo on the front, blue jeans, and black Nike shoes. The cashier also described the second robber as a Black male in his 20s, five feet nine inches tall, 150 pounds, wearing a black hooded sweatshirt with a white "Element" logo on the front, blue jeans with some embroidery on it, and black shoes.

An officer testified Wilson was six feet four inches tall and 215 pounds; Braddock was approximately five feet tall and 220 pounds; Dudley was five feet 10 inches tall and 140 pounds; and Marcus was approximately five feet nine inches tall and 130 pounds. The officer could not remember Smith's height and weight, and he did not testify as to Phipps's height and weight.

C. Rebuttal Evidence.

Officer Wright testified he interviewed Phipps at the Circle K. Originally, the officer believed Phipps was a victim. Phipps said he had heard a single gunshot when he got out of the vehicle and walked toward the front of the store, then seconds later he heard between four and five more gunshots. Phipps did not say he believed the gunshots were directed at him or that he heard or sensed the bullets going by his head. He said he ran toward Vineyard Avenue and D Street, where Wilson later told him to get in the vehicle. The two followed the SUV out of the parking lot and onto the surface streets at a high rate of speed. Wilson said he had been shot, so they pulled over and Phipps got behind the wheel. They then returned to the Circle K looking for the "two females left at the scene." Phipps did not tell the officer the shooters were Hispanic males, that he had possessed a gun, that he had fired a gun, or that he had fired a gun in self-defense.

Detective Marquez testified he interviewed Phipps the afternoon after the shooting. Phipps gave multiple versions of what happened; however, he never said he believed the gunshots were directed at him, he heard them whistle by his ear, or he otherwise felt them pass by his head. Phipps also never said he acted in self-defense, he had fired a gun, or he had taken out a gun. Phipps told Detective Marquez one of the other men said, "Hey, where you guys from?" But he did not respond. He claimed Wilson said, "Ontario Crips." Phipps also said, "Chris [Wilson] fired the weapon out there," and he and Wilson "chased after" the SUV to get the license plate number and call the police. The transcript of Detective Marquez's interview with Phipps (exhibit 199A) was admitted into evidence.

Based on the testimony he had heard Detective Marquez returned to the scene and measured the distance between where Phipps said he was standing when he fired and where the SUV was parked. The distance was approximately 125 feet.

III.

DISCUSSION

A. The Trial Court Correctly Denied Defendants' Motions to Suppress.

Phipps argues the trial court erred by denying his motion to suppress evidence because the initially consensual encounter with Officer Diaz at the Circle K became a detention for purposes of the Fourth Amendment once the officer pointed his gun at him and ordered him to come toward the police car. Phipps argues Officer Diaz lacked reasonable suspicion to detain him, and that failure to suppress the evidence taken from the Malibu and his statements was prejudicial to his defense. Wilson joins in these

arguments. Because we conclude the encounter was consensual and did not become a detention, we affirm the denial of the motions to suppress.

1. Additional facts.

Defendants moved to suppress evidence pursuant to section 1538.5, contending the initial encounter with police in the Circle K parking lot was a detention without reasonable suspicion, in violation of the Fourth Amendment to the United States Constitution.

At the hearing on the motions, Officer Diaz testified that when he arrived at the Circle K, he saw a black Malibu in the parking lot on the north side of the store. The Malibu was in a "general lane that you use to get into the parking lot," and not in a parking spot. The vehicle's reverse lights were activated when he arrived, but it was not moving in reverse. The Malibu then turned into the parking lot and drove in the direction of the Circle K. Officer Diaz drove closer to the Malibu, but he did not activate his overhead lights or his siren, and he did nothing to pull the vehicle over. As he got closer to the Malibu, the driver stopped; Phipps got out of the driver's side, and Wilson exited the passenger side. Officer Diaz did not activate his lights or siren and, instead, he got out of his police unit.

When Officer Diaz got out of his unit, Phipps told him "to get the other people," and "kind of direct[ed] [him] away from [Phipps]." Phipps said Wilson had been shot. Officer Diaz noticed Wilson's arm was bleeding from an apparent gunshot. The officer "had them come back towards the car" so he could talk to them. He did not arrest the men or place them in handcuffs. At that point, he was trying to get information about

suspects to broadcast to other officers in the area. He did not yet believe Phipps or Wilson had committed any crimes, and he treated them as if they were victims.

Officer Diaz spoke to Phipps and Wilson at the front of his police unit; he did not search the men, conduct a patdown of their persons, or search the Malibu. Phipps said four Hispanic males in a Ford Expedition or Explorer had shot at them. Officer Diaz radioed for other officers to search for four Hispanics in an Expedition and called for an ambulance to come treat Wilson. An ambulance arrived and transported Wilson to the hospital. Officer Diaz did not arrest either man, and at no time did he say the men could not leave. Officer Diaz handed Phipps off to another officer to take a full statement.

On cross-examination, Officer Diaz testified the call he received from dispatch of "shots heard" did not include a description of any vehicles that were involved or a description of any suspects. He testified the black Malibu was the only vehicle he saw in the Circle K parking lot. He thought it was odd the vehicle "was stopped in the lane used to navigate the parking lot." He testified he approached the Malibu from behind, and the vehicle already had its reverse lights activated. The Malibu then drove 60 or 70 yards before it came to a stop. Officer Diaz's police unit was equipped with a spotlight, but he did not use it to illuminate the Malibu as it drove in the parking lot. He stopped 10 to 15 yards behind the Malibu, and, concerned for his safety, he drew his firearm as he got out of his police unit. Phipps got out of the driver's side of the Malibu and started "jumping around," saying "his friend had been shot," and he yelled out for Officer Diaz "to go get the suspects." Officer Diaz wanted to get more information from the men, and, while standing by the driver's side of his police unit, he "asked them to step over to my car so

we [could] talk." He still had his gun drawn. The two men approached and sat on the push bar attached to the front of the police unit. When asked if he told the men to sit on the push bar, Officer Diaz replied, "I don't remember. I probably asked them to sit down, since Mr. Wilson was injured."

On redirect, Officer Diaz testified he held his gun "down by [his] side"; he never pointed the gun at the men; he did not "give a command at gun point"; and he reholstered the gun "[r]elatively" early during the encounter.

Wilson's attorney argued the defendants were seized for purposes of the Fourth Amendment because a reasonable person under the same circumstances would not feel free to leave. "As this officer is closing in on . . . the defendants, once they get out of the car, he has his gun drawn and tells them [to] come back to his car." Counsel argued defendants "reasonably and objectively would feel that they had been detained." Counsel also argued Officer Diaz lacked probable cause or reasonable suspicion to detain defendants. "Here the only reasonable suspicion to detain the vehicle and individuals is because it's the only vehicle that was there."

Phipps's attorney added, Officer Diaz lacked probable cause or reasonable suspicion to detain defendants. "The only reason why the vehicle drew [Officer Diaz's] attention was because it was the only vehicle there. And [the police] had no description of a vehicle, no description of subjects or suspects, no number, nothing. It was just simply guesswork and speculation."

The prosecutor argued Officer Diaz did not seize[10] defendants for purposes of the Fourth Amendment. "There was no traffic stop. The defendants approached the officer. They stopped the vehicle. And they approached and asked him for assistance. That's what he attempted." The prosecutor also noted the officer "never activated his lights or sirens."

Wilson's attorney responded he was not arguing Officer Diaz performed an unlawful traffic stop. "We haven't alleged a traffic stop. This is a stop after a call of shots fired in the area, and it's the only vehicle there. So I think that, under all the circumstances, a reasonable individual in Mr. Phipps and Mr. Wilson's position would not feel free to leave." Therefore, counsel repeated his argument the stop "constitute[d] [a] detention" and the officer lacked "any reasonable suspicion." Wilson's attorney joined in those comments.

The trial court denied the motions to suppress, concluding, "The officer didn't stop the vehicle. The vehicle was free to drive on. It didn't. They elected to get out. Mr. Phipps elected to announce that his friend was shot. I find there was no detention."

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[10] The prosecutor misspoke when he said, "[t]here is no *search* issue at all." (Italics added.) The motions to suppress challenged the initial encounter with Officer Diaz as an unlawful seizure.

2. Applicable law.

"Police contacts with individuals may be placed into three broad categories ranging from the least to the most intrusive: consensual encounters that result in no restraint of liberty whatsoever; detentions, which are seizures of an individual that are strictly limited in duration, scope, and purpose; and formal arrests or comparable restraints on an individual's liberty. [Citations.] . . . Consensual encounters do not trigger Fourth Amendment scrutiny. [Citation.] Unlike detentions, they require no articulable suspicion that the person has or is about to commit a crime." (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.)

"An officer may approach a person in a public place and ask if the person is willing to answer questions. If the person voluntarily answers, those responses, and the officer's observations, are admissible in a criminal prosecution. [Citations.] Such consensual encounters present no constitutional concerns and do not require justification. [Citation.] However, 'when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen,' the officer effects a seizure of that person, which must be justified under the Fourth Amendment to the United States Constitution. [Citations.] In situations involving a show of authority, a person is seized 'if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave,"' or '"otherwise terminate the encounter"'[citation], and if the person actually submits to the show of authority." (*People v. Brown* (2015) 61 Cal.4th 968, 974.)

"We review the trial court's characterization of defendant's contact with the [police] as a consensual encounter independently, but we review its factual findings under the deferential substantial evidence standard.[11] (*People v. Zaragoza* (2016) 1 Cal.5th 21, 56, citing *People v. Zamudio* (2008) 43 Cal.4th 327, 342.) The trial court hearing a suppression motion is the finder of fact and "'is vested with the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences.'" (*People v. Tully* (2012) 54 Cal.4th 952, 979.) "Accordingly, '[w]e view the evidence in a light most favorable to the order denying the motion to suppress' [citation], and '[a]ny conflicts in the evidence are resolved in favor of the superior court ruling' [citation]." (*Ibid*.) "[A]ll presumptions are drawn in favor of the factual determinations of the superior court and the appellate court must uphold the superior court's express or implied findings if they are supported by substantial

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[11] The prosecutor's sole theory in opposing defendants' motions to suppress was that no seizure took place because Officer Diaz made a consensual contact with defendants that required no Fourth Amendment justification. "Although it is not improper for a reviewing court to decide the merits of an alternate ground for affirming the judgment of a trial court even if that ground was not argued by the parties below (see, e.g., *People v. Robles* (2000) 23 Cal.4th 789, 800-801 & fn. 7 . . .), we have cautioned that appellate courts should not consider a Fourth Amendment theory for the first time on appeal when 'the People's new theory was not supported by the record made at the first hearing and would have necessitated the taking of considerably more evidence . . .' or when 'the defendant had no notice of the new theory and thus no opportunity to present evidence in opposition.' (*Green v. Superior Court* (1985) 40 Cal.3d 126, 137-138 . . . .)" (*Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1242.) Because we conclude the trial court properly ruled the encounter between Officer Diaz and defendants was a consensual one, we need not decide whether defendants could have been lawfully seized under the facts of this case.

evidence." (*People v. Laiwa* (1983) 34 Cal.3d 711, 718, citing *People v. Lawler* (1973) 9 Cal.3d 156, 160; accord, *People v. Carrington* (2009) 47 Cal.4th 145, 166.)

3. Analysis.

There is no question Officer Diaz did not physically restrain defendants' freedom of movement during the encounter because he did not grab, hold, handcuff, search or patdown defendants, and he did not stop or block the Malibu from driving off. Nor did the officer turn on his siren or activate his overhead lights or spotlight. So, the questions here are whether (1) Officer Diaz effected a virtual seizure of defendants through a show of authority, and (2) a reasonable person would not believe they were free to leave, or (3) defendants submitted to the show of authority.

Defendants argue Officer Diaz made a show of authority—and that a reasonable person would not feel free to leave in response to that show of authority—because he pointed his firearm at them and ordered them to walk back to the police car and sit on the push bar. But the record does not support defendants' claim the officer "ordered," "directed," or "told" them to do anything. On direct, Officer Diaz testified he "*had* them come back towards the car" so he could talk to them. (Italics added.) Whatever ambiguity existed in his use of the word "had" was dispelled on cross-examination when

he testified he "*asked* them to step over to my car so we [could] talk."[12] (Italics added.) And when asked on cross-examination whether he told defendants to sit on the push bar, the officer said he did not remember but that he "probably asked them to sit down" because of Wilson's injury.

Moreover, no testimony or evidence was presented at the suppression hearing that Officer Diaz held defendants at "gunpoint." On cross-examination, the officer testified he was concerned for his safety during the "initial contact," so he drew his firearm as he got out of his police unit. But on redirect, he clarified he held his gun "down by [his] side"; he did not "point it at" defendants; he did not "give a command at gun point"; and "[r]elatively early on" during the encounter he "put it away." Defendants appear to concede as much because, after saying the officer "pointed his gun" at them, they say he held his gun down and did not point it at them. The evidence supports the conclusion that Officer Diaz approached the men and, in a "nonaccusatory" manner, "posed basic and preliminary questions to establish whether [they] might possess information concerning [the shooting]." (*People v. Hughes* (2002) 27 Cal.4th 287, 328.)

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[12] As Phipps pointed out during oral argument before this court, on cross-examination, Officer Diaz was asked, "You told [defendants] to come toward you?" The officer answered, "I believe so." The officer testified he likely said, "Come over and talk to me." And when asked if Phipps "compli[ed] with your orders," the officer answered, "He did." According to Phipps, that testimony proves as a factual matter that Officer Diaz commanded or ordered defendants to walk back to the patrol vehicle. We disagree. As stated, *ante*, the officer also testified he "asked" defendants to walk back to the vehicle. We must defer to the trial court's resolution of any conflicts in the officer's testimony, and we conclude substantial evidence supports the court's implied finding that the officer *asked* defendants to walk back to his vehicle.

The decisions cited by defendants are easily distinguishable. In *People v. Brown*, *supra*, 61 Cal.4th 968, an officer responded to a 911 call about fighting in an alley behind the caller's home. The caller heard one of the fighters say, "'the gun was loaded.'" (*Id.* at pp. 972-973.) The officer responded within minutes of the call. As he drove down the alley, the officer saw a car driving toward him and away from where the fight allegedly had taken place. The officer yelled to the driver, "'Hey. Did you see a fight?'" The driver did not respond and kept driving. The officer continued down the alley but did not see anyone. (*Id*. at p. 973.) Suspecting the driver who had passed him might have been involved in the fight, the officer turned around and drove in the direction the driver had gone. The officer found the car parked a few houses down from the house behind which the fight had allegedly occurred. He pulled behind the car and activated his overhead emergency lights. The officer then approached the vehicle and spoke to the driver. The driver identified himself and gave the officer his driver's license. (*Ibid*.) Based on objective manifestations of intoxication, the officer arrested the driver on suspicion of driving under the influence. (*Id.* at pp. 973-974.)

Although the Supreme Court declined to adopt "a bright-line rule that an officer's use of emergency lights in close proximity to a parked car will always constitute a detention of its occupants," it held a reasonable person would not feel free to leave because "no circumstances would have conveyed to a reasonable person that [the officer] was doing anything other than effecting a detention." (*People v. Brown*, *supra*, 61 Cal.4th at p. 980.) In addition, the court held the motorist was detained because he did, in

fact, submit to the officer's show of authority when he stayed inside his car as the officer approached and he did not drive away. (*Id.* at pp. 976-977, 979-980.)

Brown is simply inapt because Officer Diaz did not activate his overhead lights, his siren, or his spotlight.

People v. Linn (2015) 241 Cal.App.4th 46 is not particularly helpful either. The question there was whether the defendant was arrested for DUI after a consensual encounter or whether she was instead detained before the officer gained probable cause because the motorcycle officer parked within three feet of the driver's door and stood even closer to the door as the defendant got out; he asked accusatory questions of the defendant about her passenger; and he then requested and retained her driver's license while he performed a license check. (*Id.* at pp. 63-64.)

Officer Diaz did not perform a traffic stop in the conventional sense; he did not park close to the Malibu and did not walk to the driver's side and ask for identification; he did not hold Phipps or Wilson's driver's licenses while performing a license check; and he did not ask accusatory questions of them. Instead, after Phipps and Wilson got out of the Malibu and walked back to Officer Diaz, he talked to them about what had happened; he learned Wilson was injured; he called for medical assistance; and he radioed the description of the suspected shooters and vehicle given to him.

Somewhat more on point are cases cited by defendants where the officers ordered suspects to do something, but those decisions are also distinguishable. In *In re J.G.* (2014) 228 Cal.App.4th 402, the officer asked a minor to sit on a curb while he asked him questions. Although the reviewing court recognized "an officer's asking a person to sit

on the curb, without more, does not generally constitute a detention," it held the circumstances demonstrated the officer's request was not one the minor was free to refuse because the officer proceeded to ask the minor accusatory questions, and several other officers arrived and displayed their weapons. (*Id*. at p. 412.) In *People v. Walker* (2012) 210 Cal.App.4th 1372, the court held an officer's question about the defendant's train fare (which the defendant ignored) was merely a ruse, and the defendant was detained because the officer proceeded to ask accusatory questions and other officers were present. (*Id*. at pp. 1388-1384.) And in *People v. Rodriguez* (1993) 21 Cal.App.4th 232, two police officers conducted a "'gang sweep'" to obtain the identities and information about gang members. (*Id*. at pp. 236-238.) The uniformed officers walked up to the defendant and four other persons. The people were socializing in front of an apartment complex known to be a gang hangout. As they approached, one of the officers said, "'stay there,'" and both officers "patted the youths down and ordered them to sit on the curb and the sidewalk." (*Id*. at pp. 237-238.) The court concluded the encounter was not consensual because "[n]o reasonable person under these circumstances would believe he was free to leave." (*Id.* at p. 238.)

In contrast to those decisions, after *asking* Phipps and Wilson to walk back to the police car and sit on the bumper, Officer Diaz did not proceed to ask them accusatory questions and no other officers were present at that point.

Finally, we do not find persuasive defendants' reliance on *People v. Challoner* (1982) 136 Cal.App.3d 779 (*Challoner*). The issue there was whether a warrantless search of the defendant's home was unlawful because the consent given for the search

was not voluntarily. (*Id*. at pp. 780-781.) Four officers arrived at the defendant's house to investigate a report of narcotics sales. The first set of officers arrived "[w]ith guns drawn" and "quickly got out of [their] van." (*Id*. at p. 781.) Three other police vehicles arrived shortly thereafter with additional police officers. (*Ibid*.) "Defendant ran toward the house, but [he] stopped abruptly when ordered to do so." (*Ibid*.) Defendant and several other people were arrested. One of the officers then rapidly went to the front porch. The front door was open, but the screen door was closed. The officer saw two women standing inside about 15 feet from the door. The officer had his gun drawn but pointed to the ground. Without knocking first, the officer said to the women, in a loud and clear voice, that he was investigating narcotics sales and he asked if either of them lived there. When one of the women said she lived in the home, the officer told her he had made some narcotics arrests outside and that he wanted to enter the home and search it for other suspects and narcotics. Another officer approached the house from behind him as the first officer said this. The woman said, "Sure." Cocaine was found in one of the bedrooms. (*Ibid*.)

A divided panel of the reviewing court held the occupant of the house did not voluntarily give consent for the search, and the defendant's motion to suppress should have been granted. (*Challoner, supra,* 136 Cal.App.3d at p. 783.) "Evidence of the drawn gun is not itself sufficient to establish that her consent was the product of coercion, but there was insufficient evidence to establish that [the occupant's] consent was voluntary. The number of officers present, the arrest of her common law husband and the others at gunpoint just moments prior to the request for permission to search the house,

the failure of [the officer] to knock before requesting permission to search, and [the occupant's] distance from the door at the time that the request to search was made, together with the display of the weapon at the time [the officer] requested permission to search, establish as a matter of law" that the consent was the product of coercion. (*Id*. at p. 782.)

The only similarity between this case and *Challoner* is that in both cases an officer had his gun drawn and pointed to the ground. But as *Challoner* made clear, "[e]vidence of the drawn gun *is not itself sufficient* to establish that her consent was the product of coercion . . . ." (*Challoner*, *supra*, 136 Cal.App.3d at p. 782, italics added.) The distinguishing features between the cases could not be less stark. Officer Diaz did not abruptly run to the Malibu when it stopped. Instead, he got out of his vehicle after Phipps and Wilson had already exited the Malibu, then asked them to walk back toward him so he could talk to them. He was the sole officer on the scene at the time of the encounter with defendants, no other suspects had been arrested at gunpoint nearby, and he reholstered his weapon early on during the encounter.

Because we conclude the encounter between Officer Diaz and defendants was consensual, we need not determine whether the officer had reasonable suspicion to detain them. The magistrate properly denied the motions to suppress.

B. The Trial Court Did Not Abuse Its Discretion by Excluding Hearsay Statements Offered by Defendants.

Phipps argues the trial court violated his right to a fair trial by applying generally applicable state evidentiary rules to preclude him from introducing reliable hearsay

statements by Braddock that implicated Dudley as the first shooter. If admitted, Phipps argues those statements would have supported his claim that he fired in self-defense. Wilson joins in this argument. We find no error.

1. Additional facts.

At trial, Wilson, joined by Phipps, moved for dismissal based on alleged *Brady*[13] error, claiming the prosecution did not disclose exculpatory evidence, to wit, recordings made of a conversation between police and Anthony Garrett (Garrett) (Anthony Junius's stepfather). In those recordings, Garrett said Braddock, Smith, and Marcus drove to Garrett's Azusa home after the shooting. Braddock allegedly told Garrett that, after leaving Dudley at a gas station, the other men wiped down the SUV. Braddock also allegedly said Dudley fired the first shot. The trial court found no *Brady* error and denied the motions.

Later, Wilson moved to admit Garrett's statements to impeach Braddock, should he testify. According to Wilson, both the prosecution and defense had attempted unsuccessfully to locate Braddock. When Wilson discovered Garrett had moved to Summit County, Ohio, the trial court issued a request to the Ohio Summit Court of Common Pleas to issue a subpoena for Garrett's testimony.

Near the end of trial, Wilson's attorney informed the trial court that the Ohio court refused to accept the certificate to compel Garrett's attendance at trial as a witness. Therefore, counsel acknowledged he did not have Garrett's testimony "to establish the

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[13] *Brady v. Maryland* (1963) 373 U.S. 83.

excited utterance foundation for the introduction of Mr. Braddock's statements to [Garrett] or to elicit Mr. Braddock's statements to him." Counsel moved to introduce two excerpts from Garrett's recorded interview with a detective in which Garrett relayed Braddock's statements. "One which basically says that Ant Dogg [(Dudley)] started shooting first. And, second, that Mr. Braddock and the others wiped down the Kia [SUV]." Counsel argued the excerpted statements were admissible under United States Supreme Court decisions such as *Chambers v. Mississippi* (1973) 410 U.S. 284, which held a defendant's due process right to present exculpatory evidence under the Sixth and Fourteenth Amendments may, in some circumstances, trump state evidentiary rules. In other words, counsel asked the court "to bypass the hearsay rules for the introduction of this testimony, which . . . is substantially reliable."

The prosecutor objected to the request, arguing the excerpts contained "double hearsay, which is a problem." With respect to Braddock's statement, the prosecutor conceded the existence of the first and third elements for the excited utterance hearsay exception, to wit, the shooting was an excitable event and Braddock's statement related to an excitable event. However, the prosecutor argued Wilson could not establish the second element, "that the speaker had no opportunity to create a thought of deception or to be complicit in his statement." According to the prosecutor, "If you have someone who had the thought process to wipe down a car to destroy evidence, then obviously they had the possibility of creating lies or deception. They're not so excited that the truth and only the truth can come from their mouth." Moreover, the prosecutor disputed Wilson's suggestion that Braddock's statement was reliable because a "more thorough reading" of

Garrett's statement was that he did not believe Braddock. "They told me different stories. He said that repeatedly."

The court indicated it had granted Wilson's certificate to compel Garrett's attendance at trial, but it had not yet made any findings on the admissibility of Garrett's recorded statements. "Hearsay is excluded for a reason, because it isn't reliable. And it needs some form of reliability. I find no evidence of reliability in the statement." Therefore, the court denied Wilson's request.

Later, after the trial court had denied defendants' motions for acquittal, Wilson's attorney made a further record. Counsel once more conceded he could not "establish the foundation for any hearsay exception" because the Ohio court refused to honor the certificate for an out-of-state subpoena. But he argued that "this Court can fashion a remedy" by allowing him to lay a foundation by examining the officer who took Garrett's statement by playing the excerpts of the recorded interview. The court once more expressed its "significant doubts" about the statement's admissibility unless Braddock was called as a witness.

2. Applicable law.

An out-of-court statement offered for its truth is inadmissible hearsay unless an exception applies. (Evid. Code, § 1200, subds. (a)-(b).) "'The chief reasons for this general rule of inadmissibility are that the statements are not made under oath, the adverse party has no opportunity to cross-examine the declarant, and the jury cannot observe the declarant's demeanor while making the statements.'" (*People v. Duarte* (2000) 24 Cal.4th 603, 610.)

Relevant here, a hearsay statement is admissible if it: "(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." (Evid. Code, § 1240.) "'"[I]f the declarations are made under the immediate influence of the occurrence to which they relate, they are deemed sufficiently trustworthy to be presented to the jury. [Citation.] [¶] The basis for this circumstantial probability of trustworthiness is 'that in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief.'" [Citation.] [Citation.] '"To render [such statements] admissible . . . it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it." [Citations.]' [Citation.] 'The crucial element in determining whether an out-of-court statement is admissible as a spontaneous declaration is the mental state of the speaker.'" (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 416.)

"Whether an out-of-court statement meets the statutory requirements for admission as a spontaneous statement is generally a question of fact for the trial court, the determination of which involves an exercise of the court's discretion. [Citation.] We will uphold the trial court's determination of facts when they are supported by substantial

evidence and review for abuse of discretion its decision to admit evidence under the spontaneous statement exception." (*People v. Merriman* (2014) 60 Cal.4th 1, 65.)

3. Analysis.

As they did at trial, defendants effectively concede Braddock's statements, as relayed by Garrett to an investigating officer, were not admissible under the excited utterance hearsay exception (or any other hearsay exception for that matter).[14] Instead, they argue the trial court should not have mechanistically applied California hearsay rules and permitted them to introduce reliable hearsay that was crucial to their defense.

"In *Chambers v. Mississippi* (1973) 410 U.S. 284 . . . , upon which defendant[s] primarily rel[y], the high court held the exclusion of testimony regarding a third party's confession to the crime for which the defendant was being prosecuted violated the defendant's constitutional right to present witnesses in his own defense. In the court's view, '[t]he testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the

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[14] In his opening brief, Phipps argued Braddock's statement should have been admitted under *Chambers*—he did *not* argue Braddock's statement was also admissible under state law. Wilson joined in that argument in his opening brief.

But in their reply briefs, both defendants argue *for the first time* that Braddock's statement was also admissible under state law as a spontaneous statement. "It is axiomatic that arguments made for the first time in a reply brief will not be entertained because of the unfairness to the other party." (*People v. Tully* (2012) 54 Cal.4th 952, 1075.) Therefore, we decline to reach the merits of those belatedly made arguments.

ends of justice.' (*Id*. at p. 302 . . . .)" (*People v. Lightsey* (2012) 54 Cal.4th 668, 715-716.)

The high court's decisions in *Chambers* and *Green v. Georgia* (1979) 442 U.S. 95 "require substantial indications of reliability" before a court must dispense with the normal rules of evidence, and our state Supreme Court has "held that '[t]he same lack of reliability that makes . . . statements excludable under state law makes them excludable under the federal Constitution.'" (*People v. Butler* (2009) 46 Cal.4th 847, 866-867.) "[T]he 'foundational prerequisites are fundamental to any exception to the hearsay rule.' [Citation.] '"[A] defendant does not have a constitutional right to the admission of unreliable hearsay statements."' [Citation.] Application of 'the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.'" (*People v. Westerfield* (2019) 6 Cal.5th 632, 705.)

Indeed, the United States Supreme Court has itself limited the application of the *Chambers* rule. "In *Chambers*, we found a due process violation in the combined application of Mississippi's common-law 'voucher rule,' which prevented a party from impeaching his own witness, and its hearsay rule that excluded the testimony of three persons to whom that witness had confessed. See *Chambers v. Mississippi*, 410 U.S. at 302. *Chambers* specifically confined its holding to the 'facts and circumstances' presented in that case; we thus stressed that the ruling did not 'signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures.' 409 U.S. at 302-303. *Chambers* therefore *does not stand for the proposition that the accused is denied a fair opportunity to defend*

himself whenever a state or federal rule excludes favorable evidence." (*United States v. Scheffer* (1998) 523 U.S. 303, 316, italics added.) "Rather, due process considerations hold sway over state evidentiary rules only when the exclusion of evidence 'undermine[s] fundamental elements of the defendant's defense.'" (*Fry v. Pliler* (2007) 551 U.S. 112, 124, quoting *Scheffer*, at p. 315; see *Nevada v. Jackson* (2013) 569 U.S. 505, 509 ["Only rarely have we held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence."].)

Because defendants concede Braddock's statements do not satisfy the foundational reliability requirements for admission under the excited utterance hearsay exception, we must conclude exclusion of the excerpts of that statement did not violate defendants' due process rights. (*People v. Butler*, *supra*, 46 Cal.4th at p. 867.)

C. Gang Issues.

1. Defendants forfeited their challenge to the form of three hypothetical questions posed to the People's gang expert.

Defendants contend three of the hypothetical questions posed to the prosecutor's gang expert improperly asked the expert, who was present throughout the trial, to base his opinion on the testimony he had heard. Defendants appear to argue the only proper way to elicit expert opinion testimony through hypothetical questions is to specifically include in the question all the material facts the witness is being asked to assume. Because they did not object to those three hypothetical questions on that specific ground, defendants forfeited their claim on appeal.

a. Applicable law.

"California law permits a person with 'special knowledge, skill, experience, training, or education' in a particular field to qualify as an expert witness (Evid. Code, § 720) and to give testimony in the form of an opinion (*id.*, § 801). Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' (*Id.*, subd. (a).) The subject matter of the culture and habits of criminal street gangs, of particular relevance here, meets this criterion." (*People v. Gardeley* (1996) 14 Cal.4th 605, 617, disapproved on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13 (*Sanchez*).)

"Evidence Code section 801 limits expert opinion testimony to an opinion that is '[b]ased on matter . . . perceived by or personally known to the witness or made known to [the witness] at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which [the expert] testimony relates . . . .' (*Id.*, subd. (b).) [¶] Generally, an expert may render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth.'" (*People v. Gardeley*, *supra*, 14 Cal.4th at pp. 617-618.)

"Use of hypothetical questions is subject to an important requirement. 'Such a hypothetical question must be rooted in facts shown by the evidence . . . .' [Citations.] A hypothetical question need not encompass all of the evidence. 'It is true that "it is not

necessary that the question include a statement of all the evidence in the case. The statement may assume facts within the limits of the evidence, not unfairly assembled, upon which the opinion of the expert is required, and considerable latitude must be allowed in the choice of facts as to the basis upon which to frame a hypothetical question." [Citation.] On the other hand, the expert's opinion may not be based "on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors . . . ." [Citations.] But, however much latitude a party has to frame hypothetical questions, the questions must be rooted in the evidence of the case being tried, not some other case." (*People v. Vang* (2011) 52 Cal.4th 1038, 1045-1046.)

"The reason for this rule should be apparent. A hypothetical question *not* based on the evidence is irrelevant and of no help to the jury. '"Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?"' [Citation.] Expert testimony not based on the evidence will not assist the trier of fact. Thus, '[a]lthough the field of permissible hypothetical questions is broad, a party cannot use this method of questioning a witness to place before the jury facts divorced from the actual evidence and for which no evidence is ever introduced.'" (*People v. Vang*, *supra*, 52 Cal.4th at p. 1046.)

"'The trial court has broad discretion in deciding whether to admit or exclude expert testimony [citation], and its decision as to whether expert testimony meets the standard for admissibility is subject to review for abuse of discretion.'" (*People v. Brown* (2014) 59 Cal.4th 86, 101.)

b. Analysis.

In support of their argument, defendants rely on *People v. Le Doux* (1909) 155 Cal. 535 (*Le Doux*), disapproved on another ground in *People v. Cahan* (1955) 44 Cal.2d 434, 445). In that capital case, the Supreme Court disapproved the introduction of expert opinion testimony based on the expert having heard the testimony of other witnesses at trial, concluding the best way to obtain an expert opinion is through a hypothetical question. The Supreme Court found the practice of relying on the evidence presented at trial "permits the expert to base his opinion upon some undeclared fact or set of facts to which he may give great weight, yet which in the minds of the jurors may be entitled to little or no consideration whatever. It makes it impossible for the jury ever to determine upon precisely what facts the expert has based his opinion, and thus makes it forever impossible for them to say what weight should be accorded to that opinion. And in this view it matters not whether the evidence in the case be actually conflicting or not. The vice still remains, if it be said that the evidence is unconflicting, since it is for the jurors alone to say what weight shall be given to this or that or the other evidence tending to establish a given fact." (*Le Doux*, at p. 554.)

We need not reach the merits of defendants' claim, however, because they forfeited it by not specifically objecting at trial on the ground they now advance. "Evidence Code section 353 provides, as relevant, 'A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to

or a motion to exclude or to strike the evidence that was timely made and s*o stated as to make clear the specific ground of the objection or motion . . . .*' (Italics added.) 'In accordance with this statute, [our Supreme Court has] consistently held that the "defendant's failure to make a timely and specific objection" on the ground asserted on appeal makes that ground not cognizable.'" (*People v. Partida* (2005) 37 Cal.4th 428, 433-434.) """Specificity is required both to enable the court to make an informed ruling on the . . . objection and to enable the party proffering the evidence to cure the defect in the evidence."""" (*People v. Mills* (2010) 48 Cal.4th 158, 207.)

Defendants only objected to two of the three hypothetical questions at issue on appeal, and the objections they interposed were not specific enough to preserve the claim they raise on appeal. First, the prosecutor asked Detective Devey whether, in his opinion, the Andy's Market robbery was gang related, and to base his opinion "on all the information you heard and investigated in this case." Wilson's attorney objected, "Assumes facts not in evidence." The trial court overruled the objection. Second, the prosecutor asked essentially the same hypothetical question about the Ontario Gas and Food robbery and asked the detective to base his opinion "on all the information that you've heard and investigated in this case." Neither defendant objected on any ground that time. Last, the prosecutor asked the detective his opinion, once again, "based on the information that you heard and investigated in this case," whether defendants' actions during the shooting were for the benefit of, at the direction of, or in association with a gang. Wilson's attorney objected, "Same objection." Presumably counsel referred to his earlier objection, "Assumes facts not in evidence," that he had interposed to the similarly

worded question.[15] Phipps's attorney joined in the objection, and the trial court overruled it.

The objections defendants interposed to those three hypothetical questions—that the questions assumed facts not in evidence—bear very little resemblance to the claim defendants make on appeal—that the hypothetical questions were improperly posed because they did not specify what evidence the expert was being asked to assume true. But even if defendants had interposed more salient objections to those three questions, as they did to other hypothetical questions posed to the expert (e.g., "Improper hypothetical. Calls for an improper opinion," "Improper hypothetical. Calls for speculation," "Improper opinion evidence"), we would still conclude defendants' objections were too general to preserve their specific claim of error.

Howard v. Oakland C. St. Ry. Co. (1895) 110 Cal. 513 (*Howard*) is instructive. There, a physician who treated a pregnant woman at the hospital testified about the woman's injuries and gave his opinion about the cause of her miscarriage. (*Id*. at p. 518.) The plaintiff also called as an expert witness a second physician who had consulted with the first physician at the hospital about the injured woman and had been present at trial and heard the first physician's testimony. Plaintiff asked him to assume the truth of the facts of that testimony and to offer his own opinion about the cause of the miscarriage. (*Id*. at pp. 518-519.) The defendant objected, "'irrelevant, immaterial, and incompetent, and not a proper hypothetical question.'" (*Id*. at p. 520.)

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[15] The People assume Wilson's attorney instead referred to his objection, "nonresponsive," to Detective Devey's answer to the immediately preceding question.

The Supreme Court concluded the defendant had not properly preserved its claim of error. "This form of objection was entirely too general to call the court's attention to the particular vice now pointed out, and it is well settled that a party will not be permitted to avail himself in this court of a more specific objection than that made in the court below. Appellant should have pointed out the particular defect which rendered the question either incompetent, irrelevant, or immaterial, or wherein it was not a proper hypothetical question, that the objection could have been intelligently ruled upon, and, if necessary or proper, obviated." (*Howard*, *supra*, 110 Cal. at p. 520.) "[T]he general objection made did not sufficiently point [to] the further specific objection now urged that it was improper in framing the hypothetical question to refer the witness generally to the facts testified to by [the first physician], as a basis of his opinion, but that the question itself should have contained a statement of such facts. Obviously, the general and sweeping suggestion 'not a proper hypothetical question' would not be calculated to direct the court's or opposite counsel's attention to what objection was aimed at. It might refer to one of a dozen supposed reasons why the question was deemed improper."[16] (*Id*. at p. 521.)

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[16] Although *Howard* held the defendant had forfeited its claim of error, the court nonetheless briefly addressed the merits. "The witness had listened to the testimony of [the first physician] as to the injuries produced upon plaintiff's person, and he was asked, assuming the injuries had been as described, to give his opinion thereon as to the inducing cause of the condition in which he found the patient at the time he was called in." (*Howard*, *supra*, 110 Cal. at p. 519.) "[W]e are not prepared to hold that in an instance such as this, where the witness has heard a statement of facts by another, it is not sufficient, in putting the question, to direct his attention to such statement as the basis upon which his opinion is desired." (*Id*. at p. 521.)

The same is true here. Defendants' general objections "did not sufficiently point [to] the further specific objection now urged that it was improper in framing the hypothetical question to refer the [gang expert] generally to the facts testified to by [other witnesses at trial], as a basis of his opinion, but that the question itself should have contained a statement of such facts." (*Howard*, *supra*, 110 Cal. at p. 521.) In other words, their objections were far too general to call attention to the specific defects they perceived in the prosecutor's hypothetical questions, and, therefore, they have forfeited their claim of error on appeal.

2. Phipps's Sixth Amendment right to confront witnesses was not violated because the prosecution did not introduce testimonial hearsay through the testimony of its gang expert.

Relying on *Sanchez*, *supra*, 63 Cal.4th 665, Phipps argues his right to confront witnesses under the Sixth Amendment to the United States Constitution was violated

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Le Doux did not address *Howard*. We need not decide whether *Le Doux* overruled *Howard* sub silentio, or whether *Le Doux* is controlling here. However, we do find it of at least passing interest that the form of hypothetical question criticized in *Le Doux* has been championed by leading treatise writers. "The extreme length and occasional incomprehensibility of the typical hypothetical question [citation] has led to attempts to simplify the procedure. One method is to eliminate the detailed hypothetical recital of all material facts and to ask the expert to state his or her opinion on the basis of prior testimony given by other witnesses and heard by the expert. (See 1 McCormick 6th, § 14; 2 Wigmore (Chadbourn Rev.) §§ 681, 686.)" (3 Witkin, Cal. Evidence (5th ed. 2012) Presentation at Trial, § 209, p. 312.) "Rather than using a hypothetical question on the basis of assumed facts, counsel may instead show the expert the trial transcript or have the expert sit through the trial testimony, and then ask the expert to state his or her opinion based on that testimony." (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2018) ¶ 11:67, p. 11-27, citing *Estate of Collin* (1957) 150 Cal.App.2d 702, 713.)

because the trial court allowed the prosecutor's gang expert to relay testimonial hearsay when rendering his opinion that the crimes committed in this case were for the benefit of a criminal street gang. Because Detective Devey did not convey to the jury the content of hearsay statements when he offered his opinions, we find no confrontation clause error.

a. *Sanchez*.

In *Sanchez*, our Supreme Court held expert witnesses "can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. They may also rely on nontestimonial hearsay properly admitted under a statutory hearsay exception. What they cannot do is present, as facts, the *content* of testimonial hearsay statements." (*Sanchez*, *supra*, 63 Cal.4th at p. 685, italics added.) "An expert may still *rely* on hearsay in forming an opinion, and may still tell the jury *in general terms* that he did so." (*Ibid*.) "What an expert *cannot* do is relate as true case-specific facts *asserted in* hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id*. at p. 686, second italics added.) In other words, the expert may not relate to the jury the content of the hearsay statements that form the basis of his opinion. (*Ibid*.)

The court adopted a multi-part test for analyzing alleged confrontation clause claims related to expert testimony. "[A] court addressing the admissibility of out-of-court statements must engage in a two-step analysis. The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being

offered by the prosecution in a criminal case, and the *Crawford* [*v. Washington* (2004) 541 U.S. 36] limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay*, as the high court defines that term." (*Sanchez, supra*, 63 Cal.4th at p. 680; see *People v. Perez* (2018) 4 Cal.5th 421, 455 ["A statement is testimonial hearsay only if it is (1) hearsay under a traditional hearsay inquiry and (2) testimonial within the meaning of *Crawford* and its progeny."].)

b. Phipps did not forfeit his claim of confrontation clause error.

Although the parties discussed at length the potential problem of testimonial hearsay being admitted during Detective Devey's expert testimony, and the trial judge briefly mentioned the *Sanchez* decision was then pending before the California Supreme Court, the People argue Phipps forfeited his confrontation clause claim because he did not specifically interpose a confrontation clause objection during the detective's testimony.

This issue is currently pending before the California Supreme Court. (*People v. Perez* (2018) 22 Cal.App.5th 201, review granted July 18, 2018, S248730, 2018 Cal. Lexis 5349 [granting review to decide, "Did defendant's failure to object at trial, before *People v. Sanchez* (2016) 63 Cal.4th 665 . . . was decided, forfeit his claim that a gang expert's testimony related case-specific hearsay in violation of his Sixth Amendment right of confrontation?"].) Because the Supreme Court has not yet decided that issue, we decline to address it here and instead address the merits of Phipps's claim.

c. Analysis.

Phipps's confrontation clause claim fails the first step of the *Sanchez* test because Detective Devey did not relay to the jury case-specific facts in the challenged portions of his testimony. The prosecutor asked the detective if, based on his training and experience, he had formed an opinion whether Phipps was an active member of the 4th Street Hustlas. The detective opined Phipps was an active member of the gang. He based that opinion on Phipps's tattoos, the crimes Phipps committed in this case, "as well as speaking to other gang investigators, [and reviewing] field investigation cards, as well as other reports."

Phipps challenges the quoted portion of that testimony, claiming Detective Devey improperly "conveyed to the jury case-specific testimonial hearsay." Phipps contends it matters not that the detective "did not specify the precise information provided by each particular source" and "did not spell out what the other sources said," because he relayed "[i]mplied hearsay . . . from which a juror could reasonably [have] infer[red] another statement . . . ." According to Phipps, the "necessary implication" from the challenged testimony was that the reports, FI cards, and statements by other investigators "provided facts showing that Phipps was an active gang member." We disagree.

People v. Garcia (2008) 168 Cal.App.4th 261, on which Phipps relies, stands for the proposition that introduction of an *express* nonhearsay statement may nonetheless violate the hearsay rule if it implies an inadmissible hearsay statement. "'[E]vidence of an *express statement* of a declarant is . . . hearsay evidence if such evidence is offered to

prove—not the truth of the matter that is stated in such statement expressly—but the truth of a matter that is stated in such statement by implication.' [Citation.] 'While the ultimate fact the statement is offered to prove is not the matter stated, the truth of the implied statement is a necessary part of the inferential reasoning process.' [Citation.] 'An implied statement may be inferred from an *express statement* whenever it is reasonable to conclude: (1) that declarant in fact intended to make such implied statement, or (2) that a recipient of declarant's *express statement* would reasonably believe that declarant intended by his *express statement* to make the implied statement.'" (*Id*. at p. 289, original italics omitted; italics added; see *People v. Perez* (1978) 83 Cal.App.3d 718, 726 [finding declarant's statement about defendant included inadmissible "implied hearsay statement that defendant was a supplier of heroin"].)

Detective Devey did not relay to the jury any *express* statements from other gang investigators that may have contained implied ones. He did not say what exactly he and the other gang investigators had spoken about and what those investigators had told him. He testified to having read FI cards and reports, but he did not say anything (specific or otherwise) about the information contained in those documents. Therefore, this case is not like *Sanchez*, where the Supreme Court held the defendant's confrontation clause rights were violated because a gang expert testified to the *contents* of police reports

concerning contacts with the defendant, a STEP notice[17] issued to the defendant, and of FI cards relating to police contacts with the defendant. (*Sanchez, supra*, 63 Cal.4th at pp. 672-673, 694-698.)

The same is true of Phipps's claim that Detective Devey relayed testimonial hearsay when he offered his opinion that the robberies and shooting were committed for the benefit of, at the direction of, or in association with the 4th Street Hustlas. As already discussed, *ante*, the detective was asked numerous times to base his opinion "on all the information that you heard and investigated in this case." But, like his testimony about conversations with other investigators and his review of FI cards and reports, the detective did not relay *what he had learned* during the investigation. His general testimony that he *relied* upon what he had learned does not run afoul of the hearsay rule.

Finally, the prosecutor asked Detective Devey a series of questions leading up to asking for his opinion whether the robbery of Andy's Market was for the benefit of the gang. "[Prosecutor]: Now, you've personally spoken to members of the 4th Street

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[17] "As part of the department's efforts to control gang activity, officers issue what are known as 'STEP notices' to individuals associating with known gang members. The purpose of the notice is to both provide and gather information. The notice informs the recipient that he is associating with a known gang; that the gang engages in criminal activity; and that, if the recipient commits certain crimes with gang members, he may face increased penalties for his conduct. The issuing officer records the date and time the notice is given, along with other identifying information like descriptions and tattoos, and the identification of the recipient's associates. Officers also prepare small report forms called field identification or "FI" cards that record an officer's contact with an individual. The form contains personal information, the date and time of contact, associates, nicknames, etc. Both STEP notices and FI cards may also record statements made at the time of the interaction." (*People v. Sanchez, supra*, 63 Cal.4th at p. 672.)

Hustla Crips gang, is that correct? [¶] [Devey]: Correct. [¶] [Prosecutor]: During those conversations, *have they indicated that they are aware of crimes that other members of the gang commit*? [¶] [Devey]: Yes. [¶] [Prosecutor]: Hypothetically speaking, if a person is an active member of a gang, would you expect them to know that their gang engages in a pattern of criminal activity, especially if they themselves are actively participating in crimes with another gang member?" (Italics added.) Defendants objected, "Improper hypothetical. Calls for an improper opinion, Your honor." The trial court overruled the objection, stating, "He may know that based on his conversations." Detective Devey answered, "They would be aware, that's correct." And after confirming the detective had "watched the entire trial," the prosecutor asked if he had an opinion, "based on all the information that you heard and investigated in this case," whether the Andy's Market robbery was for the benefit of the gang. Over the objection "[a]ssumes facts not in evidence," the detective answered the robbery was for the benefit of, at the direction of, or in association with, the gang.

Although Detective Devey relayed some of the content of his conversations with members of the gang, to wit, that they "would be aware" of crimes other members of the gang had committed, we perceive no *Sanchez* error because that is not a case-specific fact. To repeat, *Sanchez* held expert testimony exceeds the limits of what is permitted under the hearsay and expert opinion statutes when it relays to the jury the content of case-specific facts that have not been independently proven or do not fall within a statutory hearsay exception. (*Sanchez, supra,* 63 Cal.4th at pp. 685-686.)

The *Sanchez* court narrowly defined what qualifies as case-specific facts as "those relating to the *particular events and participants* alleged to have been involved in the case being tried." (*Sanchez, supra*, 63 Cal.4th at p. 676, italics added.) The court gave examples of case-specific facts, including: "That an *associate of the defendant* had a diamond tattooed on his arm would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph. That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to give an opinion that the presence of a diamond tattoo shows the person belongs to the gang." (*Id*. at p. 677, italics added.) The court made clear that "background testimony about general gang behavior or descriptions of [a] gang's conduct and its territory . . . [are] based on well-recognized sources in [a properly qualified expert witness's] area of expertise. It [is] relevant and admissible evidence as to [a] gang's history and general operations." (*Id*. at p. 698.)

Testimony that members of the 4th Street Hustlas told Detective Devey they were aware that other members committed criminal acts was not case specific because the detective did not identify those members as *associates of Phipps* or say he had spoken to them about *Phipps's* crimes. The fact members of the gang know about the activities of fellow members falls squarely within the general category of "background testimony about general gang behavior" that *Sanchez* expressly held is admissible. (*Sanchez, supra*, 63 Cal.4th at p. 698.) In other words, that portion of the detective's testimony, "while hearsay, was not case specific, but the type of general background information which has always been admissible when related by an expert." (*People v. Veamatahau* (2018)

24 Cal.App.5th 68, 73, review granted Sept. 12, 2018, S249872 [holding expert's testimony where he compared tablets taken from defendant to a database was not case-specific].)

In sum, Phipps has failed to establish his right to confront witnesses was violated.[18]

3. Substantial evidence supports the jury's true findings on the gang enhancement allegations and the gang special circumstances.

Phipps, joined by Wilson, argues the record does not contain substantial evidence that the "primary activities" of the 4th Street Hustlas are to commit one or more of the crimes enumerated in section 186.22, subdivision (e)(1)-(25) and (e)(31)-(33). (See § 186.22, subd. (f) [incorporating crimes enumerated in subd. (e)(1)-(25), (31)-(33)].) According to Phipps, the "sole testimony" about the gang's primary activities was Detective Devey's testimony that the gang is "involved in" the commission of certain

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[18] Wilson did not make a *Sanchez* claim or join in Phipps's claim. Detective Devey testified he based his opinion that Wilson was an active member of the 4th Street Hustlas on Wilson's tattoos and Wilson's "working with another gang member in the gang['s] territory committing crimes together." The detective also testified another officer had "made a stop of Wilson riding a bicycle" in the gang's territory, during which the officer "documented the gang tattoos that he was wearing." Even if Wilson had claimed the latter statement was inadmissible case-specific hearsay, and even if we were to agree, Wilson was not harmed.

Without objection, the People introduced and the trial court admitted photographs of Wilson's tattoos. (See exhibits 167-184.) And Detective Devey properly testified, as general background, about the symbols and colors associated with the gang and about the tattoos its members wore. He described Wilson's tattoos as depicted in the properly admitted photos, which matched the descriptions he had given of tattoos worn by members of the gang. The error, *if any*, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; see *Sanchez*, *supra*, 63 Cal.4th at pp. 698-699 [applying harmless beyond a reasonable doubt standard])

crimes. Relying primarily on *In re Alexander L.* (2007) 149 Cal.App.4th 605, Phipps contends the testimony established, at most, the gang had occasionally committed crimes over a five-year period, which does not satisfy the gang statutes. Therefore, he argues the gang enhancements and gang-murder special circumstances must be reversed.

The People reply Phipps takes "a myopic view" of the expert testimony, and, taken as a whole, that testimony established the "primary activities" of the gang are the commission of enumerated crimes. The People have the better argument.

a. Applicable law.

"There are two prongs to the gang enhancement under section 186.22, subdivision (b)(1), both of which must be established by the evidence. [Citation.] The first prong requires proof that the underlying felony was 'gang-related,' that is, the defendant committed the charged offense 'for the benefit of, at the direction of, or in association with any criminal street gang.' (§ 186.22, subd. (b)(1); [citations].) The second prong 'requires that a defendant commit the gang-related felony "with the specific intent to promote, further, or assist in any criminal conduct by gang members."' ([citation]; § 186.22, subd. (b)(1).) . . . '[T]he prosecution's evidence must permit the jury to infer that the "gang" that the defendant sought to benefit, and the "gang" that the prosecution proves to exist, are one and the same.' [Citation.] 'That gang is defined in section 186.22[, subdivision] (f), which provides that the gang must consist of "three or more persons" who have as one of their "primary activities the commission of" certain enumerated criminal acts; who share "a common name or common identifying sign or symbol"; and "whose members individually or collectively engage in or have engaged in

a pattern of criminal gang activity.'"" (*People v. Franklin* (2016) 248 Cal.App.4th 938, 948.)

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes be one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute." (*Id.* at p. 324.) The prosecution may also satisfy this requirement through expert testimony about statutorily enumerated crimes committed by the gang. (*Ibid.*)

"Section 190.2, subdivision (a)(22), sets forth the elements of the gang-murder special circumstance: '[t]he defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang . . . and the murder was carried out to further the activities of the criminal street gang.'" (*People v. Mejia* (2012) 211 Cal.App.4th 586, 611.) And pursuant to section 190.2, subdivision (c), special circumstances liability—including the gang-murder special circumstance—attaches "to accomplices of the actual killer who aid and abet with an intent to kill." (*Mejia*, at p. 611.)

"'In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable,

credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] "A reviewing court neither reweighs evidence nor reevaluates a witness's credibility." [Citation.]' [Citation.] The same test applies to the review of special circumstantial findings." (*People v. Livingston* (2012) 53 Cal.4th 1145, 1170.)

b. Analysis.

In re Alexander L., *supra*, 149 Cal.App.4th 605, on which Phipps heavily relies, is distinguishable. There, a wardship petition alleged the minor committed three counts of vandalism resulting in damage under $400 (§§ 602, 594, subds.(a), (b)(2)(A)), and that the substantive crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang. (*Alexander L.*, at p. 609.) The only evidence in support of the gang's primary activities consisted of the gang expert's testimony: "'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.'" (*Id.* at p. 611.) This testimony was found to be insufficient, not only because the expert failed to directly testify those crimes constituted the gang's primary activities (*id.* at p. 612), but also because, based on the record, the appellate court did not know whether the basis of the

expert's "testimony on this point was reliable, because information establishing reliability was never elicited from him at trial." (*Ibid.*) As a result, the appellate court concluded it was "impossible to tell whether his claimed knowledge of the gang's activities might have been based on highly reliable sources, such as court records of convictions, or entirely unreliable hearsay." (*Ibid.*)

Here, Detective Devey testified he was familiar with the primary activities of gangs in general. When asked, "what are the primary activities of the 4th Street Hustla Crips?," he testified the gang was "involved in a pattern of criminal activity, . . . from everything small, from thefts, narcotics sales, to the more serious [offenses] of weapons possession, robberies, violent assaults, up to and including murder." When asked his opinion if members of the gang had individually or collectively engaged in a pattern of criminal activity, the detective answered, "Yes, they have."

If that had been the extent of the expert testimony about the gang's primary activity, we might agree with Phipps. But, unlike in *Alexander L.*, there was more here. The prosecutor asked Detective Devey, "And do you have *specific knowledge of specific convictions* that members of this gang have suffered?" (Italics added.) He answered, "Correct." The detective testified one documented member of the gang had suffered a conviction for possessing a firearm (former § 12021) in January 2011; a second documented member had suffered a conviction for committing a murder (§ 187) in March 2009; and a third documented member had suffered a conviction for committing an attempted robbery (§§ 664, 211) in June 2007. That evidence clearly satisfied the required showing that the gang committed one or more predicate offenses for the purpose

of the gang enhancements. (§ 186.22, subd. (e)(2) [attempted robbery], (e)(3) [murder], (e)(31) [possessing a firearm].)

Phipps nonetheless argues the "commission of occasional qualifying crimes over a period of five years by so large a gang" is not enough. Detective Devey testified the 4th Street Hustlas had roughly 40 documented members and "many more" undocumented members. In contrast, Phipps's expert testified PDL had *over 200* documented members. But even if we accept for the sake of argument the 4th Street Hustlas are a "large" gang, we are not persuaded.

People v. Perez (2004) 118 Cal.App.4th 151, on which Phipps also relies, is likewise distinguishable. The defendant in that case, a member of a Hispanic gang, was prosecuted for the attempted murder of an Asian youth. (*Id*. at p. 154.) The prosecutor presented no expert testimony to establish the gang's primary activity was engaging in the commission of the offenses listed in section 186.22, subdivision (e). (*Perez*, at p. 159.) Instead, the prosecution presented evidence that six years earlier gang members had been involved in the attempted murder of a youth and that a few weeks prior to the charged offense, after a fellow member of the Hispanic gang was murdered by members of an Asian gang, three Asian men were shot one night and a fourth was shot a second night. (*Id*. at pp. 156-157.) In finding the evidence insufficient to show the primary activities of the Hispanic gang was the commission of the enumerated offenses, the *Perez* court noted that no expert testimony was presented on the issue. It then stated, "Even if we assume that the [Hispanic] gang was responsible for the shootings of Asians on February 16 and 18, as well as the shooting of [the victim in the case before the court],

such evidence of the retaliatory shootings of a few individuals over a period of less than a week, together with a beating six years earlier, was insufficient to establish that 'the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute.'" (*Id.* at p. 160.)

In contrast to *Perez*, the offenses in this case occurred over a greater period of time than a week; none of the predicate offenses in this case was six years old; and here, an expert testified the 4th Street Hustlas were involved in a "pattern of criminal activity."

Finally, Phipps contends "[t]he prosecutor inadvertently revealed the absence of substantial evidence of primary activities" in his closing arguments. But for the reasons already stated, we conclude there was substantial evidence in the record to support the jury's necessary findings for the gang enhancements and gang special circumstance that the gang's primary activities included commission of enumerated crimes. The jury was properly instructed with a modified CALCRIM No. 222 that the arguments of counsel are not evidence, and we must "presume the jury understood and followed" that instruction. (*People v. Jackson* (2016) 1 Cal.5th 269, 352.)

D. Wilson's Conviction for Attempted Murder (*Count 7*) *Must Be Reversed for Insufficient Evidence.*

Wilson argues the record does not contain substantial evidence to support his conviction for the attempted murder of Marcus. According to Wilson, the record does not support his conviction as a *direct* perpetrator because the evidence showed Phipps fired at Marcus. He also argues the evidence does not support his conviction for attempted murder on an aider and abettor theory. The jury was not instructed on the

natural and probable consequences theory of aider and abettor liability for the charge of attempted murder, so, according to Wilson, he could *only* be found guilty of attempted murder as an aider and abettor if the evidence demonstrated he shared Phipps's specific intent to kill Marcus.[19] Because the record does not show he shared that intent, Wilson argues his conviction cannot stand. We agree.

1. Applicable law.

"'Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citations.] 'Intent to unlawfully kill and express malice are, in essence, "one and the same."' [Citation.] Express malice requires a showing that the assailant either desires the victim's death or knows to a substantial certainty that the victim's death will occur." (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.) "To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others." (*People v. Bland* (2002) 28 Cal.4th 313, 328 (*Bland*).)

"'All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are

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[19] Wilson also argues the doctrine of transferred intent does not apply to the crime of attempted murder and the jury was not instructed that it could find Wilson guilty of attempted murder under the "kill zone" theory. The People do not defend Wilson's attempted murder conviction under those theories.

principals in any crime so committed.' (Pen. Code, § 31; [citations].) Thus, a person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts. [Citation.] Because aiders and abettors may be criminally liable for acts not their own, cases have described their liability as 'vicarious.'" (*People v. McCoy* (2001) 25 Cal.4th 1111, 1116-1117.)

"To be guilty of a crime as an aider and abettor, a person must 'aid[] the [direct] perpetrator by acts or encourage[] him [or her] by words or gestures.' [Citations.] In addition, except under the natural-and-probable-consequences doctrine [citations], . . . the person must give such aid or encouragement 'with knowledge of the criminal purpose of the [direct] perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of,' the crime in question. [Citations.] When the crime at issue requires a specific intent, in order to be guilty as an aider and abettor the person 'must share the specific intent of the [direct] perpetrator,' that is to say, the person must 'know[] the full extent of the [direct] perpetrator's criminal purpose and [must] give[] aid or encouragement with the intent or purpose of facilitating the [direct] perpetrator's commission of the crime.' [Citation.] Thus, to be guilty of attempted murder as an aider and abettor, a person must give aid or encouragement with knowledge of the direct perpetrator's intent to kill and with the purpose of facilitating the direct perpetrator's accomplishment of the intended killing—which means that the person guilty of attempted murder as an aider and abettor must intend to kill." (*People v. Lee* (2003) 31 Cal.4th 613, 623-624.)

We apply the normal substantial evidence test to determine whether Wilson's conviction for attempted murder is supported by the record. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1212-1213; see, *ante,* pp. 56-57.)

2. Analysis.

The People contend the record contains substantial evidence "that Wilson aided and abetted Phipps in the willful, deliberate, and premeditated attempted murder of Marcus Junius." In support of this argument, the People contend the jury was properly instructed it could convict Wilson of attempted murder under *two* aider and abettor theories: (1) aiding and abetting with the specific intent to kill; and (2) aiding and abetting under the natural and probable consequences doctrine. Not so.

The trial court instructed the jury with CALCRIM Nos. 400 and 401 that a person may be guilty of a crime if he "aided and abetted a perpetrator who directly committed the crime."[20] The court explained CALCRIM No. 401 as follows: "Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime." And the trial court instructed the jury with CALCRIM No. 600 on the elements of attempted murder, but that instruction did not

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[20] The court instructed the jury with CALCRIM No. 401 as follows: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime."

explain how the jury could find either defendant guilty as aiders and abettors under the natural and probable consequences doctrine.

The court did instruct the jury with CALCRIM No. 402 on aiding and abetting under the natural and probable consequences theory, but that instruction was expressly limited to the charge of shooting at an occupied motor vehicle as alleged in count 5.[21] And during closing argument, the prosecutor reinforced his limited reliance on the natural and probable consequences doctrine in this case when he argued Wilson was guilty of shooting at the Corolla as an aider and abettor. He did *not* argue the jury could find Wilson guilty of the *attempted murder of Marcus* as an aider and abettor under the natural and probable consequences.

Because "the trial court did not instruct the jury on the natural and probable consequences doctrine" as it related to the charge of attempted murder, and instead "instructed only on an aider and abettor's guilt of the intended crim[e]" of attempted murder, "only an aider and abettor's guilt of *intended* crime is relevant here." (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1117, italics added.)

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[21] The court instructed the jury with CALCRIM No. 402 as follows: "To prove that the defendant is guilty of Count 5, Shooting at an Occupied Motor Vehicle, the People must prove that: [¶] 1. The defendant is guilty of Murder and/or Attempted Murder; [¶] 2. During the commission of Murder and/or Attempted Murder, a co-participant in that Murder and/or Attempted Murder committed the crime of Shooting at an Occupied Motor Vehicle; and [¶] 3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of Shooting at an Occupied Motor Vehicle was a *natural and probable consequence* of the commission of the Murder and/or Attempted Murder." (Italics added.) The court further instructed: "A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes."

The People argue Wilson "set in motion" the shooting by issuing a gang challenge to Dudley and calling out, "'Ontario Crips.'" When Dudley ignored the challenge and walked away, Wilson drove the Malibu around to where the SUV was parked and fired at the SUV's passenger side. As the occupants of the SUV "scrambled" for cover, Phipps had a "clear line-of-sight" at the SUV from where he was standing at the south side of the Circle K. Phipps shot and killed Anthony with his first bullet, then fired four times at Marcus. According to the People, "Wilson's and Phipps's actions were synchronized in the committing of the murder, attempted murder, and shooting at an occupied vehicle."

Had the jury been properly instructed on a natural and probable consequences aider and abettor theory *for attempted murder*, we might agree with the People. But the scenario does not support Wilson's conviction for attempted murder on the theory of *specific intent* aider and abettor liability. As the People contend, the record shows Wilson "swooped" around to the *passenger* side of the SUV and started shooting at Dudley. This caused Dudley to grab a gun and return fire from the passenger side of the SUV. But Anthony and Marcus were on the *driver*'s side of the SUV. Phipps's had a clear shot at Anthony on the driver's side of the SUV from where he stood at the front of the Circle K, and the jury could reasonably infer from the evidence that Phipps specifically intended to kill Marcus as he ran from the drivers' side of the SUV to the front of the store. But, as Wilson contends in his briefs, there was no evidence whatsoever that Wilson ever saw Marcus on the driver's side of the SUV either before he drove the Malibu over toward the SUV or as he fired at the passenger side of the SUV. Nor did the People introduce any evidence, circumstantial or otherwise, that Wilson had

any intent whatsoever with respect to Marcus, let alone that he shared Phipps's specific intent to kill Marcus.

The People also argue Wilson's actions *after* the shooting support his conviction for attempted murder as an aider and abettor. Wilson's acts of stopping to pick up Phipps, chasing the SUV out of the parking lot, and driving past the Ramada Inn and taunting Sanders were certainly evidence of a consciousness of guilt the jury could consider with respect to aider and abettor liability for the murder of Anthony. But, again, absent any evidence that Wilson was even aware of the presence of Marcus or that he shared Phipps's specific intent to kill Marcus, Wilson's conduct after the shooting does not support his conviction for attempted murder.

Because we conclude the record does not contain substantial evidence to support Wilson's attempted murder conviction on the sole theory presented to the jury, we must reverse his conviction and sentence on count 7.

E. Claims of Instructional Error.

1. The trial court properly instructed the jury on accomplice testimony with CALCRIM No. 335.

Phipps argues the trial court erred prejudicially by instructing the jury with CALCRIM No. 335 that, if it concluded Wilson was guilty of the crimes charged against him, "then . . . Phipps was an accomplice to those crimes." According to Phipps, that instruction essentially directed the jury to enter verdicts of guilt against him. Put another way, Phipps argues the instruction impermissibly included a mandatory presumption that,

if the jury found Wilson guilty, then it had to also find Phipps guilty of those crimes. We find no error.

a. Additional background.

As recounted, *ante*, Phipps admitted he participated in the armed robberies with a person named Aaron. He did not implicate Wilson in the robberies. Phipps admitted he had previously been a member of the 4th Street Hustlas, but he denied Wilson was a member of the gang. And Phipps testified he shot back in self-defense when he heard and/or felt bullets fly by his head as he walked away from the Circle K while texting his girlfriend. Again, Phipps did not implicate Wilson in the shooting. Instead, Phipps testified he did not hear Wilson say anything to Dudley, and he did not see Wilson handle or fire a gun that evening.

During a discussion of jury instructions, the trial court indicated it would instruct the jury on accomplice testimony. "Since Mr. Phipps has testified he is an accomplice, and he's an accomplice as a matter of law in that he has been charged with identical crimes as Mr. Wilson was charged with. So [CALCRIM No.] 334, I don't believe, is an appropriate instruction. But [CALCRIM No.] 335 would be the appropriate instruction." The court and Phipps's attorney discussed appropriate modifications to CALCRIM No. 335, but neither defendant objected to the instruction being given.

The trial court instructed the jury with a modified CALCRIM No. 335 as follows: "If the crimes charged were committed, then Napoleon Phipps was an accomplice to those crimes. [¶] You may not convict defendant, Christopher Wilson, of the crimes charged based upon the testimony of an accomplice alone. You may use the statement or

testimony of an accomplice to convict the defendant only if: [¶] The accomplice's statement or testimony is supported by other evidence that you believe; [¶] That supporting evidence is independent of the accomplice's statement or testimony; and [¶] That supporting evidence tends to connect defendant, Christopher Wilson, to the commission of the crimes." The trial court also instructed that supporting evidence "may be slight," but accomplice testimony "that tends to incriminate" Wilson "should be viewed with caution" and the jury should decide what weight to give Phipps's testimony.

b. Applicable law.

"The trial court must instruct the jury 'on general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case.'" (*People v. Anderson* (2018) 5 Cal.5th 372, 413.) "The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law [citation] and also whether instructions effectively direct a finding adverse to a defendant by removing an issue from the jury's consideration [citations]." (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

Relevant here, the court must instruct the jury that accomplice testimony must be corroborated and should be viewed with distrust. (See *People v. Williams* (1997) 16 Cal.4th 635, 682.) A defendant may not be convicted based on the testimony of an accomplice unless the testimony is corroborated by independent evidence that tends to connect the defendant to the crime. (§ 1111.) An accomplice is defined as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (*Ibid.*) "'A witness is liable to

prosecution within the meaning of section 1111 if he or she is a principal in the crime.' [Citation.] A principal includes those who 'directly commit the act constituting the offense' and those who 'aid and abet in its commission.' (§ 31.)" (*People v. Carrasco* (2014) 59 Cal.4th 924, 968.)

"[W]hether a witness is an accomplice is a question of fact for the jury unless no reasonable dispute exists as to the facts or the inferences to be drawn from them." (*People v. Manibusan* (2013) 58 Cal.4th 40, 93.) "If the evidence establishes as a matter of law that the witness was an accomplice," however, "the court must so instruct the jury . . . ." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1271.)

c. Analysis.

As an initial matter, we reject the People's argument that Phipps's forfeited his challenge to CALCRIM No. 335 by not objecting to it being given or requesting appropriate modifications. We may review a challenge to "any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (§ 1259; see *People v. Amezcua and Flores* (2019) 6 Cal.5th 886, 1143.)

In *People v. Johnson* (2016) 243 Cal.App.4th 1247, the defendants argued "CALCRIM No. 335 amounted to an unconstitutional mandatory presumption that they aided and abetted the charged offenses—that is, that they were guilty as charged." (*Johnson*, at p. 1275.) The court disagreed. "A similar argument was made and rejected in *People v. Hardy* (1992) 2 Cal.4th 86, 151-152 . . . . There, the jury was instructed that a number of witnesses were accomplices as a matter of law to the extent that crimes

alleged in an information—including murder—were committed. The defendants in *Hardy* argued the witnesses were clearly accomplices and, therefore, the jury was improperly allowed to conclude that a conspiracy did, in fact, exist. The court disagreed, holding that 'no reasonable juror would have so interpreted the instruction in light of the other instructions,' including an instruction that the jury was required to determine as to each defendant individually whether he was a member of a conspiracy. ([*Hardy*,] at p. 151.)" (*Johnson*, at p. 1276.)

After reviewing the instructions given as a whole, the court in *People v. Johnson*, *supra*, 243 Cal.App.4th at pages 1276-1277, concluded "[a] reasonable juror would have understood CALCRIM No. 335 as directing that neither defendant could be convicted solely upon the testimony of his codefendant without independent supporting evidence, and that the testimony of each defendant against the other should be viewed with 'care and caution'—not that the entire trial was without purpose because the court's instruction on how to view an accomplice's testimony was really a direction to find defendants guilty of aiding and abetting the charged offenses. 'We credit jurors with intelligence and common sense [citation] and do not assume that these virtues will abandon them when presented with a court's instructions. [Citations.]' [Citation.] '[N]o reasonable juror would have interpreted [CALCRIM No. 335] in the manner now argued by defendants.'"

So too here. The jury was properly instructed with CALCRIM No. 203 that it "must separately consider the evidence as it applies to *each defendant*. You must decide each charge for *each defendant separately*." (Italics added.) And the jury was properly instructed with CALCRIM No. 220 on the presumption of innocence and that the People

had the burden of proving guilt beyond a reasonable doubt. A reasonable jury would not have understood CALCRIM No. 335 as directing it to conclude Phipps was guilty of the offences charged.[22]

2. Defendants were not prejudiced when the trial court erroneously gave the jury a supplemental instruction on transferred intent.

Phipps, joined by Wilson, argues the trial court erred by giving the jury a supplemental instruction on the doctrine of transferred intent after the jury had already been instructed and the parties had completed their closing arguments. Phipps contends the issue of transferred intent was not raised during closing argument, and the trial court violated his right to effective assistance of counsel by not permitting him to reopen argument and address the concept. The error did not prejudice defendants.

a. Additional background.

During closing argument, the prosecutor explained the jury could find Phipps guilty of first degree murder as a direct perpetrator, and Wilson guilty of first degree murder as an aider and abettor, only if it concluded they had "[e]xpress malice" or the specific intent to kill. "Well, how do you intend to kill? You point a gun and you shoot it at someone. You hit them in the left temple."

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[22] Citing the bench notes to CALCRIM No. 335, Phipps implicitly argues the trial court should have instead instructed the jury with CALCRIM No. 334 and left it to the jury to decide if he was an accomplice. But there is no genuine dispute Phipps was an accomplice as a matter of law, and he does not argue the jury *would not* have found him to be an accomplice had it been instructed with CALCRIM No. 334 instead. (See *People v. Johnson*, *supra*, 243 Cal.App.4th at pp. 1271-1273 [finding that the trial court should have instructed with CALCRIM No. 334 instead of 335, but the error was harmless].)

The prosecutor explained that "implied malice" reduces a murder from first to second degree: "[Y]ou did something deadly but you didn't actually intend to kill that person. You did something so deadly and you didn't care what the consequences were." He gave as an example: "You shot at a group of individuals; maybe you didn't . . . target a particular person, but when you shoot into a group, it's quite likely that somebody is going to die; right? That's implied malice. You don't care about the results. You do a deadly act, consequences be damned."

The prosecutor then reiterated that express malice versus implied malice determines the degree of murder, not whether the killing constituted murder. "If you have malice, you have murder; the only question is the degree. If you have malice, either express or implied, it's murder; okay? The lack of malice is manslaughter; all right? [¶] So if you have malice—either express, you intend to kill, it's an active killing, or implied, it's such a dangerous act, regardless of the consequences—it's murder."

The prosecutor argued he had two theories why the killing of Anthony was first degree murder. "The first is premeditation—willful, deliberate, with premeditation; the second is discharge from a motor vehicle. Either theory gets you to First [degree]." He told the jurors they did not have to unanimously agree on either theory, so long as they individually agreed with one of the theories for first degree murder. "If it's neither one of those theories, it's Second Degree murder, okay, if you have malice." The prosecutor explained further how the jury could find defendants harbored express malice under the two theories of first degree murder, and argued the facts supported guilty verdicts under either theory.

In his closing argument, Phipps's attorney argued his client was not guilty of murder, attempted murder, or shooting at an occupied motor vehicle because he fired in self-defense. Counsel discussed the concept of imperfect self-defense to reduce murder to manslaughter, but he did not address the prosecutor's theories for first degree murder or address second degree murder.

Wilson's attorney did address the prosecutor's theories for first degree murder. After discussing the charges of attempted murder of Marcus and shooting at an occupied motor vehicle, counsel addressed the murder charge. "We know—I think we know that Mr. Wilson did not shoot Anthony Junius. In fact, like Marcus Junius, there's no evidence that Wilson could even see Anthony Junius or knew Anthony Junius was there that night. [¶] So the prosecution for Wilson wants to rely on a theory of aiding and abetting. For aiding and abetting, Mr. Wilson has to share Mr. Phipps's intent to kill, we're going to kill Anthony Junius—maybe not by name—but that's the person we are going to kill." Counsel argued "[t]here is no evidence of this," so "[t]here is no First Degree Murder here." He did not specifically address second degree murder.

The next morning, the trial court informed the parties it intended to give the jury an additional instruction. "[The prosecutor] in his arguments raised the issue and it somewhat became an issue in [Wilson's counsel's] argument also, that that is the transfer of the intent to kill. [¶] [CALCRIM No.] 562, it applies only to the murder. So the only change that I made to [CALCRIM No.] 562—and I've handwritten it onto your copies—is the crime of murder. But I think this is a necessary instruction and it is deemed to be a

sua sponte [instruction] when it becomes an issue, and it clearly has become an issue. I would be giving it along with the other concluding instructions we already discussed."

Wilson's attorney responded, "Your Honor, I obviously haven't [had the] chance to research this, on behalf of Mr. Wilson, [so] I'd pose an objection." Phipps's attorney also objected. "Because we've instructed them, argued to them, and now we're going to add some additional instruction. That's my concern." The court effectively overruled the objections, stating: "That happens, you know. . . . [B]oth of you heard [the prosecutor's] argument in which he talked about the transfer of intent. And in some respect, [Wilson's attorney] had some response to that in his arguments. The jury needs to be instructed with regard to what the law is on that. [¶] And I have not completed all of the instructions in the case. I intend to give that to them."

As part of its concluding instructions, the court instructed the jury with a modified CALCRIM No. 562: "In the crime of murder, if the defendant intended to kill one person, but by mistake or accident killed somebody else instead, then the crime, if any, is the same as if the intended person had been killed."

b. Applicable law.

"With regard to the timing of jury instructions on the law, . . . trial courts are vested with wide discretion as to when to instruct the jury. (§§ 1093, subd. (f), 1094; [citation].)" (*People v. Smith* (2008) 168 Cal.App.4th 7, 14.) "[S]ection 1093 sets out the general order in which a trial should proceed, specifically providing in subdivision (f) that at the conclusion of the evidence and after the closing arguments of counsel, the court may charge the jury and give them a written copy of the instructions read.

Subdivision (f), however, also provides that '[a]t the beginning of the trial or from time to time during the trial, and without any request from either party, the trial judge may give the jury such instructions on the law applicable to the case as the judge may deem necessary for their guidance on hearing the case.' Under section 1094, the court may depart from the usual order of trial set forth in section 1093 'for good reasons, and in the sound discretion of the Court.' (§ 1094.)" (*Id.* at p. 15.) "[L]ike other instructional error claims, those challenging the timing of instructions as an abuse of discretion or a violation of due process are determined based on a review of the instructions as a whole in light of the entire record." (*Id.* at p. 16.)

"'[T]he court is not *precluded* from giving any instruction for which there is evidentiary support. The fact that a party did not pursue a particular theory does not preclude the trial judge from giving an instruction on that theory where it deems such an instruction to be appropriate.' [Citation.] The trial '"judge must always be alert to the possibility that counsel in the course of argument may have befuddled the jury as to the law. If this occurs, then either at the time the confusion arises or as part of the final instructive process the judge should rearticulate the correct rule of law."' [Citations.] The court has 'a duty to reinstruct if it becomes apparent that the jury may be confused on the law.'" (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 128.)

"To prevent unfair prejudice," however, "if a supplemental instruction introduces new matter for consideration by the jury, the parties should be given an opportunity to argue the theory. [Citations.] 'The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution guarantee a

criminal defendant the right to the effective assistance of counsel at all critical stages of the proceedings.' [Citation.] '"To effectuate the constitutional rights to counsel and to due process of law, an accused must . . . have a reasonable opportunity to prepare a defense and respond to the charges." [Citation.]' [Citation.] If supplemental or curative instructions are given by the trial court without granting defense counsel an opportunity to object, and if necessary, offer additional legal argument to respond to the substance of the new instructions, the spirit of section 1093.5 and the defendant's right to a fair trial may be compromised." (*People v. Ardoin*, *supra*, 196 Cal.App.4th at p. 129.) "[T]he trial court's refusal to reopen the case" for additional argument in light of a supplemental instruction "requires reversal only if, viewing the record in its entirety, a party '"was unfairly prevented from arguing his or her defense to the jury or was substantially misled in formulating and presenting arguments." [Citation.]' [Citations.] 'The question is whether this court can "conclude that the effectiveness of counsel's argument and hence of appellant's defense was not impaired by counsel's inaccurate information regarding the court's charge."'" (*Id*. at p. 134.)

c. Analysis.

Phipps argues the trial court erred prejudicially by giving the supplemental instruction because "[t]he prosecutor *never* raised the issue of transferred intent, and the court did not point to a single passage to support its view that he had done so." In addition, Phipps argues Wilson's counsel did not raise the issue either. We agree neither the prosecutor nor Wilson's attorney addressed the concept of transferred intent in their

closing argument. Instead, the prosecutor addressed the concept of conscious disregard for human life second degree murder.

Murder is the unlawful killing of a human being or fetus with malice aforethought. (§ 187, subd. (a).) Malice may be express or implied. (§ 188, subd. (a).) Express malice means "a deliberate intention to unlawfully take away the life of a fellow creature." (*Id.*, subd. (a)(1).) "Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (*Id.*, subd. (a)(2).) An unlawful killing with express malice is first degree murder. (§ 189, subd. (a).) An unlawful killing with implied malice is second degree murder. (*Id.*, subd. (b).)

"'Under the classic formulation of California's common law doctrine of transferred intent, a defendant who shoots *with the intent to kill a certain person* and hits a bystander instead is subject to the same criminal liability that would have been imposed had "'the fatal blow reached the person for whom intended.'" [Citation.] In such a factual setting, the defendant is deemed as culpable as if he had accomplished what he set out to do.'" (*People v. Shabazz* (2006) 38 Cal.4th 55, 62, italics added.) That factual scenario represents the classic "bad aim" case that, under the doctrine of transferred intent, properly justifies a conviction for *first* degree murder. (*People v. Scott* (1996) 14 Cal.4th 544, 550-553.)

Contrary to the suggestion in the People's brief, the prosecutor did not address or "touch[] on the concept of transferred intent" during closing argument. After discussing express malice and first degree murder, the prosecutor explained implied malice for

second degree murder. "[Y]ou did something deadly *but you didn't actually intend to kill that person*. You did something so deadly and you didn't care what the consequences were." (Italics added.) The specific example he gave was, "You shot at a group of individuals; *maybe you didn't . . . target a particular person,* but when you shoot into a group, it's quite likely that someone is going to die; right? That's implied malice. You don't care about the results. You do a deadly act, consequences be damned." (Italics added.) The factual scenario discussed by the prosecutor clearly addressed the theory of implied malice murder based on a conscious disregard of human life. (E.g., *People v. Roberts* (1992) 2 Cal.4th 271, 317 ["[I]mplied malice may be found when a defendant, knowing that his or her conduct endangers life and acting with conscious disregard of the danger, commits an act the natural consequences of which are dangerous to life. [Citation.] Thus, to invoke a classic example, a person who fires a bullet through a window, not knowing or caring whether anyone is behind it, may be liable for homicide regardless of any intent to kill."].)

Nor was the concept of transferred intent fairly raised by the evidence. The prosecutor's theory was that Phipps intended to kill Anthony and Marcus as he fired at them from the front of the Circle K, and Wilson was guilty as an aider and abettor by driving around to the SUV, shooting at Dudley, and causing the occupants of the SUV to scramble into the open. A reasonable jury could have reached verdicts of first degree murder on the evidence presented in this case. But no evidence supported first degree murder liability for either defendant on the theory they shot at one person with the specific intent to kill, yet accidentally missed and killed another.

In short, the trial court introduced a "new matter" and should have given the parties the opportunity to argue to the jury that the doctrine of transferred intent had no application under the facts of this case. (*People v. Ardoin, supra*, 196 Cal.App.4th at p. 129.) In any event, we find no prejudice. Defendants were not unfairly prevented from presenting a defense to the theories of liability that were squarely presented to the jury. Having heard the evidence—which did not support the theory that either defendant intentionally shot at one person and accidentally hit another—and having heard the arguments of counsel—which, at most, addressed the classic "shooting into a crowd" implied malice second degree murder—a reasonable jury would not have been confused by the trial court's erroneous introduction of the concept of transferred intent first degree murder.

The jury was properly instructed with CALCRIM No. 520 that the charge of murder under count 6 required a finding of malice aforethought, and that malice could be express or implied.[23] The instruction properly explained what natural and probable consequence means and instructed the jury to return a verdict of second degree murder unless the People proved beyond a reasonable doubt that the murder was in the first degree. CALCRIM No. 521 explained to the jury it could find defendants guilty of first degree murder under one of two theories—that defendants "acted willfully" and "intended to kill," or that they committed the murder by shooting from a motor vehicle. For the second theory of first

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[23] The court instructed the jury with CALCRIM No. 520 as follows: "The defendant acted with express malice if he unlawfully intended to kill," and "[t]he defendant acted with implied malice if: [¶] 1. He intentionally committed an act; [¶] 2. The natural and probable consequences of the act were dangerous to human life; [¶] 3. At the time he acted, he knew his act was dangerous to human life; and [¶] 4. He deliberately acted with conscious disregard for human life."

degree murder, the jury was instructed it had to find: "1. He shot a firearm from a motor vehicle; [¶] 2. He intentionally shot at a person who was outside the vehicle; and [¶] 3. He intended to kill that person."

The jury was also properly instructed with CALCRIM No. 200 that "[s]ome of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." We must presume the jury understood and properly applied that instruction. (*People v. Chism* (2014) 58 Cal.4th 1266, 1299 [jury presumed to have followed the instruction to disregard inapplicable instructions]; *People v. Scott* (1988) 200 Cal.App.3d 1090, 1095 [same].) And the fact the jury was instructed to disregard inapplicable instructions mitigated against any prejudice that might have arisen from the trial court incorrectly giving a transferred intent instruction. (*People v. Saddler* (1979) 24 Cal.3d 671, 684; *People v. Vega* (2015) 236 Cal.App.4th 484, 503; *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1472.)

3. Defendants did not object that the instructions on the murder by shooting from a motor vehicle charge and on the special circumstance of murder by shooting from a motor vehicle were incomplete or required clarification, so they forfeited their claim of error on appeal.

Phipps, again joined by Wilson, argues the trial court erred by not instructing the jury it had to find a "causal relationship" between Wilson shooting from the Malibu and Anthony's death before it could find defendants guilty of first degree murder "by means

of" shooting from a motor vehicle, and before it could find true the special circumstance that the murder was accomplished "by means of" shooting from an occupied motor vehicle. (§§ 189, subd. (a), 190.2, subd. (a)(21).) According to Phipps, the trial court had a sua sponte duty to instruct with CALCRIM No. 240 on proximate causation and substantial factor causation, and erroneously omitted language from CALCRIM No. 520 that also addresses substantial factor causation, because the evidence showed there may have been more than one cause of Anthony's death. Defendants forfeited this claim.

a. Additional background.

During discussion of jury instructions, the court addressed CALCRIM No. 520. "The defendant is charged in Count 6. There's no fetus involved. Delete the language about 'give element three,' and leave element three in there. [¶] . . . [¶] . . . Then on the second page, there's only one cause of death that's been described. So that paragraph would just—second bracket would be deleted." The trial court's second proposed deletion referred to optional language from the pattern instruction on causation when there may have been more than one cause of death.[24] Neither party objected to the court's proposed deletion to CALCRIM No. 520 or argued the trial court should have instructed with CALCRIM No. 240 on causation.

With respect to CALCRIM No. 521, the court inquired about the prosecutor's second theory of first degree murder. The prosecutor explained, "It's under the aiding

[24] "[There may be more than one cause of death. (An act/[or] (A/a) failure to act) causes death only if it is a substantial factor in causing the death. A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.]" (CALCRIM No. 520, boldface omitted.)

and abetting theory . . . . You have a 'fired from a motor vehicle.'" The prosecutor argued, "we believe there's evidence Mr. Wilson fired a round from a moving vehicle, it missed, but Mr. Phipps fired the fatal shot at the same time aiding and abetting. It would be an intent they both shared. That would be the first-degree murder theory." Phipps's attorney stated, "Wouldn't that require Mr. Phipps be aware Mr. Wilson was firing from a motor vehicle? I don't think there's any evidence of that." And Wilson's attorney stated, "If the People's theory is that Wilson intended to kill and shot from the Malibu as he was driving and that that aids and abets Mr. Phipps, then Mr. Wilson has a claim of self-defense as well, because he was being shot at." The court stated it had concerns with respect to the related special circumstances allegation. The prosecutor argued the evidence showed Phipps and Wilson worked together and ambushed the occupants of the SUV, so the shooting from a motor vehicle theory of first degree murder and the special circumstances instruction were proper.

Later, after having read authorities provided by the parties and ruling on motions to acquit, the trial court ruled discharge from a motor vehicle was a theory the prosecutor could advance and that the theory would be included in CALCRIM No. 521. Phipps's attorney objected to the theory being applied to both defendants, but he did not object the instruction was incomplete because it failed to instruct on causation. Finally, the court indicated it would instruct the jury with CALCRIM No. 735 for the shooting from a motor vehicle special circumstance. Again, neither defendant objected the proposed instruction was incomplete because it failed to instruct on causation.

The trial court instructed the jury with CALCRIM No. 520 on the elements of homicide. That instruction explained, "An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence." As stated, *ante*, the trial court instructed the jury with CALCRIM No. 521 that the prosecutor's two theories of first degree murder were that (1) defendants willfully, deliberately, and with premeditation killed Anthony, and (2) they shot and killed Anthony from a motor vehicle. And the trial court instructed the jury with CALCRIM No. 735 that the special circumstance of shooting from a motor vehicle required it find: "1. The defendant or principal shot a firearm from a motor vehicle, killing Anthony Junius; [¶] 2. The defendant or principal intentionally shot at a person who was outside the vehicle; and [¶] 3. At the time of the shooting, the defendant intended to kill." Neither defendant objected during the reading of the instructions that they were inaccurate, incomplete, or needed clarification to explain causation.

b. Analysis.

As already noted, a defendant may challenge on appeal "any instruction given, refused, or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (§ 1259.) "But '[a] party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial.'" (*People v.*

Buenrostro (2018) 6 Cal.5th 367, 428.) Because neither defendant requested the trial court instruct on causation, and neither objected the instructions given did not adequately address the legal issues fairly raised by the evidence, their claim of error has been forfeited.

4. The trial court erred by not instructing the jury on grossly negligent discharge of a firearm as a lesser included offense of shooting at an occupied motor vehicle (*count 5*).

Wilson argues the trial court erred by not instructing that, for purposes of count 5, grossly negligent discharge of a firearm (§ 246.3) is a lesser included offense of shooting at an occupied motor vehicle (§ 246). We agree the trial court erred, reverse the convictions and their enhancements, and remand for the trial court to reduce the convictions to the lesser included offenses and resentence on count 5 unless the People elect to retry defendants on the greater offense.[25]

a. Applicable law.

A trial court has a sua sponte duty to instruct on lesser included offenses "'"'"when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]'" [Citation.] "[T]he existence of 'any evidence, no matter how

[25] Phipps did not formally join in Wilson's argument. However, it would be unfair to withhold the benefit of the reduction of the conviction to Phipps under the circumstance of this case, where Wilson's aider and abettor liability on count 5 was predicated on *Phipps* shooting at Marcus and hitting the Corolla in the process. A lesser included instruction on grossly negligent discharge of a firearm obviously would have applied to both defendants.

weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.]"' [Citations.] In this regard, the testimony of a single witness, including that of a defendant, may suffice to require lesser included offense instructions. [Citation.] Courts must assess sufficiency of the evidence without evaluating the credibility of witnesses, for that is a task reserved for the jury." (*People v. Wyatt* (2012) 55 Cal.4th 694, 698.)

"An erroneous failure to instruct on a lesser included offense requires reversal of a conviction if, taking into account the entire record, it appears '"reasonably probable"' the defendant would have obtained a more favorable outcome had the error not occurred." (*People v. Ledesma* (2006) 39 Cal.4th 641, 716.) However, if "'the court's instructional error affected only *the degree of the crime* of which [defendant] was convicted,' we '"may reduce the conviction to [the] lesser degree [of the offense] and affirm the judgment as modified, thereby obviating the necessity for a retrial,"' but at the same time we must '"give the prosecutor the option of retrying the greater offense, or accepting [the] reduction to the lesser offense."'" (*People v. Rivera* (2015) 234 Cal.App.4th 1350, 1359, italics added.)

b. Analysis.

Section 246 provides, in relevant part, "Any person who shall maliciously and willfully discharge a firearm at an . . . occupied motor vehicle . . . is guilty of a felony . . . ." And section 246.3 provides, in relevant part, "[A]ny person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty" of a wobbler. (§ 246.3, subd. (a).)

There is no dispute that grossly negligent discharge of a firearm, in violation of section 246.3, subdivision (a), is a lesser included offense of maliciously and willfully shooting at an occupied motor vehicle, in violation of section 246. (See *People v. Ramirez* (2009) 45 Cal.4th 980, 990 [holding grossly negligent discharge of a firearm is a lesser included offense of shooting at an inhabited house].) "Both offenses require that the defendant willfully fire a gun. Although the mens rea requirements are somewhat differently described, both are general intent crimes. The high probability of human death or personal injury in section 246 is similar to, although greater than, the formulation of likelihood in section 246.3(a), which requires that injury or death 'could result.' The only other difference between the two, and the basis for the more serious treatment of a section 246 offense, is that the greater offense requires that an [occupied motor vehicle] be within the defendant's firing range. All the elements of section 246.3[, subdivision](a) are necessarily included in the more stringent requirements of section 246." (*Ramirez*, at p. 990.)

The People argue Wilson was guilty of the greater offense of shooting at an occupied motor vehicle, and not of the lesser included offense, because, "either directly or through Phipps, [he] shot at *a* vehicle" and "there was no evidence he simply shot in a grossly negligent manner." (Italics added.) The People seem to assume count 5 applied to both Phipps's shooting at Anthony and Marcus and accidentally hitting the Corolla *and* Wilson's purposeful shooting at the SUV. If that were true, we would agree there was no evidence Wilson fired in a grossly negligent manner and just happened to hit the SUV. However, although the first amended information, the relevant jury instruction, and the

verdict forms did not specify which vehicle count 5 applied to, during closing argument, the prosecutor made an election and limited the People's theory on that count to shooting at the Corolla.[26]

Because the prosecutor limited his theory on count 5 to Phipps shooting and hitting the Corolla, the People's assertion on appeal that Wilson set up the ambush on the occupants of the SUV and that he shot at the SUV in a grossly negligent manner is

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[26] After addressing the charge of attempted murder of Marcus, the prosecutor addressed count 5: "Shooting at a vehicle, happening at the same time as the attempted murder . . . . [¶] . . . [¶] The things about the firing—so, just in case you were wondering. You might say, well, we don't think he [i.e., Phipps] intended to hit the Corolla; right? [¶] We don't either. The intention was to hit Marcus Junius; he just happened to hit the Corolla in the process. [¶] The question is, is that okay? Right, who bears responsibility for that? Is that Ms. [Sanders's] problem? Like, sorry, it's on you for being in the wrong place at the wrong time. No, no, that's an absurd result. [¶] What [the instruction] says is, if you do an act intentionally—not the intent to actually hit that target, but you do an act intentionally, you pull the trigger, and in the process while you're trying to do something illegal—like injure someone else—you hit an occupied vehicle, you're responsible. And that makes sense; doesn't it? Right? [¶] So there's no intent required as far as hitting the Corolla. It's that you intentionally shot the gun; and in the process, you hit the Corolla. And when you were shooing the gun, it was an unjustified shooting. That's the standard; okay?" The prosecutor conceded Wilson "signed up to go after the people in the KIA [SUV]" but "most certainly had no intention that in the process, the white Corolla would be hit by Mr. Phipps." Nonetheless, the prosecutor argued Wilson was liable under count 5 as an aider and abettor because the Corolla getting hit was a natural and probable consequence of Phipps's shooting at Marcus. The prosecutor never argued the jury could find either defendant guilty under count 5 for Wilson shooting *at the SUV*.

misplaced.[27] The correct question is, was there enough evidence in the record that *Phipps* fired in a grossly negligent manner, such that the trial court should have instructed on the lesser included offense for his direct liability on count 5 and for Wilson's liability on that count as an aider and abettor?

The People argue the evidence did not support an instruction on the lesser included offense of grossly negligent discharge, let alone a conviction on the lesser included offense instead of the greater offense, because Phipps did not "festively fire[] a gun." That argument is based on the false premise that section 246.3 is violated *only* when a defendant festively discharges a firearm in a grossly negligent way. Certainly the "'dangerous practice of discharging firearms into the air during festive occasions'" was the principal motivation behind the Legislature adopting section 246.3. (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1361 (*Overman*); accord, *People v. Ramirez*, *supra*, 45 Cal.4th at p. 987 ["The bill enacting section 246.3 was introduced in response

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[27] By holding the People to their election as to which act constituted shooting at an occupied motor vehicle for purposes of count 5, we avoid having to address whether the trial court erred by not giving the jury a unanimity instruction on that count.

To protect a defendant's constitutional right to a unanimous jury (Cal. Const., art I, § 16; *People v. Jones* (1990) 51 Cal.3d 294, 321), "'if one criminal act is charged, but the evidence tends to show the commission of more than one such act, "*either* the prosecution must elect the specific act relied upon to prove the charge to the jury, *or* the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act." [Citations.]' [Citation.] [¶] The prosecution can make an election by 'tying each specific count to specific criminal acts elicited from the victims' testimony'—typically in opening statement and/or closing argument." (*People v. Brown* (2017) 11 Cal.App.5th 332, 341.)

to the phenomenon of celebratory gunfire."].) But the statute is not limited to that circumstance.

For example, the defendant in *Overman*, after arguing with two coworkers, shot at his place of business six times with an assault rifle through the open window of his vehicle as he was on the roadway some 20 yards away. (*Overman, supra,* 126 Cal.App.4th at pp. 1352-1353.) The defendant was convicted of assaulting his two coworkers with a firearm and of discharging a firearm at an occupied building. (*Id*. at p. 1350.) This court concluded the trial court erred by not instructing the jury on the lesser included offense of grossly negligent discharge of a firearm. (*Id*. at pp. 1358-1363.) Nothing about the shooting in that case was festive or celebratory.

The People introduced no evidence at trial that Phipps intentionally fired *at* the Corolla, only that he fired at Marcus, and hit the Corolla and the front of the Circle K in the process. The prosecutor conceded as much during closing argument, saying Phipps "just happened to hit the Corolla" that was "in the wrong place at the wrong time." Although the evidence supported a conviction for both defendants on the greater offense of shooting at an occupied motor vehicle, the same evidence would have supported a conviction on the lesser included offense as well.

Because we cannot say on this record a jury would have convicted defendants solely on the greater offense had it been properly instructed on the lesser included offense, we reverse the convictions and sentences on count 5 and the related sentence enhancements and direct the trial court to reduce the convictions to grossly negligent discharge of a firearm in violation of section 246.3, subdivision (a) and resentence

defendants appropriately. The People have the option of accepting the reduction or retrying defendants on the greater offense within the statutory period. (*People v. Rivera*, *supra*, 234 Cal.App.4th at p. 1359.)

F. Claims of Sentencing Error.

1. The first amended information provided defendants with constitutionally adequate notice they were subject to sentencing enhancements for personal use of a firearm and personal and intentional discharge of a firearm (*counts 5 through 7*).

Defendants argue the trial court erred by imposing firearm use enhancements under section 12022.53 on counts 5 through 7 because the first amended information alleged a "principal," rather than a named defendant, personally discharged a firearm. Defendants did not demur to the first amended information or object on the ground of uncertainty, so they have forfeited their claim of error. In any event, we conclude defendants received constitutionally adequate notice they were subject to additional punishment for discharging a firearm during the commission of counts 5 through 7.

a. Additional background.

The first amended information alleged numerous sentence enhancements for the substantive offenses. For example, all eight counts were alleged to have been committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist the criminal conduct of the gang, within the meaning of section 186.22, subdivision (b)(1)(C), (A), (b)(4)(B).

The first amended information also alleged numerous sentence enhancements for the use of a firearm. For example, count 1 alleged Wilson, *by name*, personally used a firearm during the commission of the Andy's Market robbery within the meaning of section 12022.53, subdivision (b). But most of the firearm enhancement allegations did not specifically name which defendant they applied to. Count 1 alleged "a *principal* personally used a firearm" within the meaning of section 12022.53, subdivisions (b) and (e)(1). (Italics added.) Count 5 alleged "a *principal* personally and intentionally discharged a firearm" within the meaning of section 12022.53, subdivisions (c) and (e)(1). (Italics added.) And counts 6 and 7 alleged "a *principal* personally and intentionally discharged a firearm" within the meaning of section 12022.53, subdivisions (d) and (e)(1). (Italics added, boldface omitted.)

The jury instructions were much more specific with respect to the identity of the person who was alleged to have used or discharged a firearm. A modified CALCRIM No. 3146 instructed the jury that, if it found *Wilson* guilty on counts 1, 3, 5, 6, and/or 7 (or guilty on any lesser included offenses), it had to "decide whether, for each crime, the People have proved the additional allegation that *the defendant* [(i.e., Wilson)] Personally Used a Firearm during the commission or attempted commission of that crime." (Italics added.) The same instruction informed the jury that, if it found *Phipps* guilty on counts 5, 6, and/or 7 (or guilty on any lesser included offenses), it had to "decide whether, for each crime, the People have proved the additional allegation that *the defendant* [(i.e., Phipps)] Personally Used a Firearm during the commission or attempted commission of that crime." (Italics added.)

Similarly, for counts 5, 6 and/or 7, the trial court instructed the jury with a modified CALCRIM No. 3148 that, if it found *Wilson* and/or *Phipps* guilty of those offenses (or guilty of lesser included offenses), it had to "decide whether, for each crime, the People have proved the additional allegation that *the defendant* [(i.e., Wilson and/or Phipps)] personally and intentionally discharged a firearm during that offense." (Italics added.) The instruction explained that, to satisfy the allegation, the People had to prove "[t]he *defendant* personally discharged a firearm" and "[t]he *defendant* intended to discharge the firearm." (Italics added.) The instruction for personal discharge of a firearm that causes great bodily injury or death alleged against *Phipps* for counts 6 and 7 (CALCRIM No. 3149) likewise instructed the jury to decide if "[t]he *defendant*" personally and intentionally discharged a firearm and "[t]he *defendant's* act caused great bodily injury to or the death of a person." (Italics added.)

The instruction for the enhancement allegations for personally using a firearm during the commission of counts 1, 3, 5, 6, and 7, and the instruction for the enhancement allegation for personally and intentionally discharging a firearm during the commission of counts 5, 6, and 7 (CALCRIM No. 1402), informed the jury that, if it found *Wilson* and/or *Phipps* guilty of those offenses (or guilty of lesser included offenses), and if it found "the *defendant* [(i.e., *Wilson* and/or *Phipps*)] committed those crimes for the benefit of, at the direction of, or in association with a criminal street gang" (italics added), it had to also determine if "one of the principals" in those crimes personally used and personally and intentionally discharged a firearm. The instructions explained, "A person is a principal in a crime if he or she directly commits or attempts to commit the

crime, or if he or she aids and abets someone else who commits or attempts to commit the crime."

Finally, the trial court instructed the jury with a modified CALCRIM No. 1402 that, if it found *Wilson* and/or *Phipps* guilty of murder and/or attempted murder as alleged in counts 6 and/or 7 (or guilty on lesser included offenses), and if it concluded "the *defendant* [(i.e., *Wilson* and/or *Phipps*)] committed those crimes for the benefit of, at the direction of, or in association with a criminal street gang" (italics added), it had to also decide if "one of the principals" to those crimes personally and intentionally discharged a firearm and caused great bodily harm or death. Once again, the instruction stated, "A person is a principal in a crime if he or she directly commits or attempts to commit the crime, or if he or she aids and abets someone else who commits or attempts to commit the crime." And during closing argument, the prosecutor further explained to the jury that the term "'principal'" referred to the *defendants* and to no one else.[28]

The jury rendered true findings on all firearm enhancement allegations against both defendants.

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[28] The prosecutor argued: "The final set of enhancements . . . is the gun stuff; okay? And the gun is going to come in two forms; right? Some of them are going to say 'personal,' that means you did it yourself. In this case both of them used guns. So when it says 'personal,' that means when you're looking at Mr. Phipps' verdict forms, that means Mr. Phipps personally used the gun. [¶] The other option is a 'principal.' The other person they did the crimes with, they used the gun. You will see them both. So at the Circle K, they both used guns; they both discharged guns. So you will see both personal and principal; they'll both be an option. Okay? [¶] So you look at the verdict forms, if you are looking at Mr. Phipps, 'personal' means him, and 'principal' means Mr. Wilson. Reverse that when you are looking at Mr. Wilson's forms; 'personal' means him, and 'principal' means Mr. Phipps."

b. Applicable law.

Section 12022.53, which applies directly to murder and attempted murder (*id*. at subd. (a)(1), (18)) and, through the "principal" gang and firearm enhancements, applies to the crime of shooting at an occupied motor vehicle (see *People v. Jones* (2009) 47 Cal.4th 566, 572-579), provides for graduated sentencing enhancements for the use of a firearm in the commission of specified crimes. If applicable, section 12022.53 mandates an additional sentence of 10 years in state prison if the defendant personally used a firearm (*id*. at subd. (b)), 20 years in state prison if he personally and intentionally discharged a firearm (*id*. at subd. (c)), and 25 years to life in state prison if he personally and intentionally discharged a firearm, and proximately caused great bodily injury (*id*. at subd. (d)).

The sentence enhancements under section 12022.53, subdivisions (b) through (d), are also applicable to a "principal" in the commission of the underlying crime if the People plead and prove: (1) the "principal" is guilty of committing the offense for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to promote, further, or assist in criminal activity of gang members, in violation of section 186.22, subdivision (b); and (2) any "principal" involved in the commission of the underlying crime personally used a firearm, personally and intentionally discharged a firearm, or personally and intentionally discharged a firearm and caused great bodily injury. (§ 12022.53, subd. (e)(1)(A), (e)(1)(B).)

Enhancements for personal use of or discharge of a firearm "shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact." (§ 12022.53, subd. (j); see § 1170.1, subd. (e).) "'[I]n addition to the statutory requirements that enhancement provisions be pleaded and proven, a defendant has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes.'" (*In re Varnell* (2003) 30 Cal.4th 1132, 1143, italics omitted.)

An accusatory pleading must state the charges and special allegations "in ordinary and concise language" sufficient to provide the defendant with "notice of the offense of which he is accused."[29] (§ 952.) The words in an accusatory pleading must be given "their usual acceptance in common language" except for words "defined by law, which are construed according to their legal meaning." (§ 957.) As pertinent here, "principal" has a specific legal definition apart from its ordinary meaning. A principal means any person "concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . ." (§ 31.)

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[29] At least one published decision has held, with little analysis, that sections 950 through 952 do not apply to how sentence enhancements are pleaded. (*People v. Jackson* (1985) 171 Cal.App.3d 609, 615, disapproved on other grounds in *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1091, fn. 10; see *People v. Nguyen* (2017) 18 Cal.App.5th 260, 268 (*Nguyen*).) Regardless, we believe the principles embodied in section 952 are applicable to how sentence enhancements must be pleaded.

"The function of an information is to provide the defendant with sufficient notice of the charge he must meet at trial. [Citations.] [¶] 'Any uncertainty in the pleading amounts to no more than a defect of form, which should be attacked by demurrer under Penal Code section 1004. Failure to demur to an information on the ground of uncertainty constitutes a waiver of the objection [citations], and the validity of a subsequent judgment is not affected. (Pen. Code, § 960.)'" (*People v. Polowicz* (1992) 5 Cal.App.4th 1082, 1093-1094 (*Polowicz*), fns. omitted; accord, *People v. Ramirez* (2003) 109 Cal.App.4th 992, 997 ["'failure to demur [or object] to [a pleading] which does not state the particulars of an offense with sufficient clarity is a waiver of the defects'"]; see § 1012 [except for objection to jurisdiction of the court or that the facts alleged do no state a public offense, objection to defects apparent face of the pleading "can be taken only by demurrer, and failure so to take it shall be deemed a waiver thereof"].)

As the *Polowicz* court explained: "The waiver rule promotes efficiency and conserves judicial resources by allowing correction of pleading defects prior to trial and prevents a defendant '"from speculating on the result of the trial and raising the objection after an unfavorable verdict."'" (*Polowicz, supra*, 5 Cal.App.4th at p. 1094, quoting *People v. Jennings* (1991) 53 Cal.3d 334, 357.)

c. Analysis.

Initially, we note the issue in this case is *not* whether the defendants' due process rights were violated because they received sentence enhancements that were never pleaded. There is no genuine dispute the first amended information alleged

enhancements for use of a firearm and personal discharge of a firearm, including the "principal" gang firearm enhancements, in language taken almost verbatim from sections 186.22 and 12022.53. Therefore, the decisions in *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*), *People v. Botello* (2010) 183 Cal.App.4th 1014, *Nguyen*, *supra*, 18 Cal.App.5th 260, and *People v. Jimenez* (2019) 35 Cal.App.5th 373, on which defendants rely, are not on point because the defendants in those cases were subjected to sentence enhancements that were *not pleaded* in the accusatory pleading. (*Mancebo*, at p. 740; *Botello*, at pp. 1021-1022; *Nguyen*, at pp. 262, 266; *Jimenez*, at pp. 377, 393-397.)

The issue in this case is whether there was uncertainty on the face of the first amended information in how it pleaded the firearm use enhancements, such that defendants were not provided with adequate notice. Defendants did not demur to the first amended information on any ground. And at no time before trial, during trial, or at sentencing did defendants object to the first amended information on the ground it was uncertain on its face or failed to provide constitutionally adequate notice they would be subject to the firearm enhancements they now challenge on appeal. They therefore have forfeited their claim of error.[30] (§ 1012; *People v. Jennings*, *supra*, 53 Cal.3d at pp. 356-

[30] Phipps's reliance on the forfeiture analysis from *Mancebo* and its progeny is misplaced because the defendants in those cases received sentence enhancements that were *not pleaded* so the reviewing courts could address the unlawful imposition of sentence even in the absence of an objection. (See *Nguyen*, *supra*, 18 Cal.App.5th at pp. 271-272.) To repeat, the first amended information in this case *did* plead firearm use enhancements, but its use of "principal" instead of specifically naming defendants arguably rendered the pleading uncertain on its face.

357; *People v. Ramirez*, *supra*, 109 Cal.App.4th at p. 997; *Polowicz*, *supra*, 5 Cal.App.4th at pp. 1093-1094.)

Moreover, we conclude defendants did, in fact, receive fair notice they were subject to the firearm use and discharge of a firearm enhancements, and they were not "misled to [their] prejudice in presenting a defense." (*People v. Wilford* (2017) 12 Cal.App.5th 827, 837, citing *People v. Ramirez*, *supra*, 109 Cal.App.4th at p. 999.) As demonstrated, *ante*, although the first amended information utilized the statutory language "a principal" in the allegations under section 12022.53, the allegations related to the counts where *both defendants* were charged as direct perpetrators and/or aiders and abettors. Defendants were not misled that they were subject to the enhancements. The jury instructions made the point even clearer by defining whom a "principal" was. And any residual confusion was completely dispelled during the prosecutor's closing argument. Therefore, the trial court did not err by imposing the enhancements.

However, because we reverse Wilson's conviction for attempted murder (count 7) for insufficient evidence and reverse the sentence (see discussion, *ante*, pt. III.D), all related sentence enhancements, including those for personal and intentional discharge of a firearm, must also be stricken. In addition, because we reverse both defendants' felony convictions for shooting at an occupied motor vehicle (count 5) and remand for the trial court to reduce the convictions to the lesser included wobbler offense of grossly negligent discharge of a firearm (see discussion, *ante*, pt. III.E.4), at resentencing the court must first determine whether the new convictions are felonies before it may reimpose the firearm use enhancements.

2. The trial court properly sentenced Wilson on all three counts of being a felon in possession of a firearm (*counts 2, 4 & 8), and Wilson was properly convicted on both counts 2 and 4.*

Wilson argues the trial court erred by sentencing him on counts 2, 4, and 8 for his convictions of being a felon in possession of a firearm. He makes three alternative arguments. First, Wilson argues the sentences on counts 2, 4, and 8 had to be stayed under section 654 because there was no evidence he had antecedent possession of the firearm used during the corresponding substantive offenses, i.e., in the two robberies (counts 1 & 3) and in the shooting at the Circle K (counts 5, 6, & 7). Second, he contends his conviction for possession of a firearm under count 2 *or* 4 should be reversed because former section 12021, subdivision (a)(1), is a continuing offense, and there is no evidence he lost actual or constructive possession of the revolver between the first and second robbery. And third, even if he could lawfully be convicted of two counts of possessing the revolver used during the robberies, Wilson argues the trial court should have stayed sentence on one of the counts because his possession of the firearm was continuous.

We disagree.

a. Additional background.

Phipps admitted to ownership of the revolver used in the robberies of Andy's Market and the Ontario Gas and Food; he purchased it a few days before the first robbery. He testified the other man who participated in the robberies (according to

Phipps, a man named Aaron, not Wilson) took the gun from Phipps just before they committed the robberies. Phipps admitted he had the revolver with him on the day of the shooting at the Circle K. That same day, he purchased a 22-caliber semiautomatic handgun. He testified he placed the semiautomatic on the rear passenger floorboard in the Malibu after he and his group left the gathering.

At sentencing, the trial court concluded Wilson's convictions under counts 2 and 4 for being a felon in possession of a firearm were "separate" acts to the robberies, and that his conviction under count 8 of being a felon in possession of a firearm was based on a "different incident than the prior two incidents" and Wilson "had a different firearm" than the one "he used on prior occasions." The trial court sentenced Wilson on all three counts.

b. Applicable law.

"It is well settled that section 654[31] protects against multiple punishment, not multiple conviction. [Citation.] The statute itself literally applies only where such punishment arises out of multiple statutory violations produced by the 'same act or omission.' [Citation.] However, because the statute is intended to ensure that defendant is punished 'commensurate with his culpability' [citation], its protection has been extended to cases in which there are several offenses committed during 'a course of

[31] Section 654, subdivision (a), provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

conduct deemed to be indivisible in time.'" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

"'"'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.'"'" (*People v. Capistrano* (2014) 59 Cal.4th 830, 885, overruled on another ground in *People v. Hardy* (2018) 5 Cal.5th 56, 104.) "'It is [the] defendant's intent and objective, not temporal proximity of his offenses, which determine whether the transaction is indivisible.' [Citation.] '"The defendant's intent and objectives are factual questions for the trial court; [to permit multiple punishments,] there must be evidence to support [the] finding the defendant formed a separate intent and objective for each offense for which he was sentenced."'" (*Capistrano,* at p. 886.)

The trial court's findings about a defendant's intent and objectives "will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

"In cases involving firearms and multiple punishment issues, a section 654, subdivision (a) violation has been held to occur in an unusual factual scenario. Section 654, subdivision (a) has been held to apply when fortuitous circumstances place the firearm in the accused's hands only at the instant of the commission of another offense."

(*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1565, citing *People v. Bradford* (1976) 17 Cal.3d 8, 21-23 & *People v. Venegas* (1970) 10 Cal.App.3d 814, 818-821.) "From *Bradford* and *Venegas*, [this court] distill[ed] the principle that if the evidence demonstrates at most that fortuitous circumstances put the firearm in the defendant's hand only at the instant of committing another offense, section 654 will bar a separate punishment for the possession of the weapon by an ex-felon." (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1412.) "[S]ection 654 is inapplicable," however, "when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm." (*People v. Jones*, *supra*, 103 Cal.App.4th at p. 1145.)

c. Analysis.

Although Phipps did not implicate Wilson in the robberies, his testimony undermines Wilson's arguments. Phipps testified the robberies were essentially impromptu crimes committed while he was supposedly with a man named Aaron. On both occasions, Phipps suggested the two men rob a store, and Aaron took the revolver from Phipps just before they walked to the store. A felon violates former section 12021, subdivision (a)(1), the instant he intentionally comes into actual or constructive possession of a firearm. (*People v. Ratcliff*, *supra*, 223 Cal.App.3d at p. 1410.) In other words, the crimes alleged in counts 2 and 4 were completed as soon as Wilson took the revolver from Phipps. Wilson necessarily possessed the revolver before he and Phipps entered the stores and committed the robberies. That Wilson only possessed the revolver for a brief period before, during, and after the robberies is of no moment; the evidence supports the conclusion that Wilson had antecedent possession of the firearm, and section

654 did not bar his sentence on counts 2 and 4. (*People v. Jones*, *supra*, 103 Cal.App.4th at pp. 1147-1148.) Likewise, the evidence supports the inference Wilson had two independent intents and objectives—take possession of the revolver (knowing he was legally barred from doing so) and use it in the robberies. (See *ibid*.)

The same logic applies to count 8. Phipps testified he placed the semiautomatic handgun on the floorboard of the Malibu, and the evidence supported the jury's and the trial judge's necessary findings that Wilson took possession of the weapon at some point between the confrontation with Dudley in front of the Circle K and when Wilson fired the weapon from the Malibu at the SUV. That possession, however brief, was antecedent to the shooting and with a distinct intent, so the trial court was not required to stay the sentence on count 8.

Phipps's testimony also undermines Wilson's claim that he continuously possessed the revolver from the time of the first robbery to the second robbery, such that the trial court was required to stay the sentence for the two related convictions for possession of a firearm by a felon. Phipps bought the revolver a few days before the first robbery; he had it with him on the days of the robbery; and he handed the revolver to the second robber (Aaron, according to Phipps) minutes before the robberies. Phipps's additional testimony that he had the revolver with him on the day of the shooting further supports the inference that Wilson only briefly handled the revolver immediately before, during, and immediately after the robberies, but he gave it back to Phipps. Because there is no evidence in the record Wilson continuously possessed the revolver, section 654 does

not prohibit separate punishment for its unlawful possession.[32] (*People v. Wynn* (2010) 184 Cal.App.4th 1210, 1218; *People v. Jones*, *supra*, 103 Cal.App.4th at p. 1145.)

3. Conceded errors in minutes of sentencing and abstracts of judgment.

Defendants contend, and the People concede, that the minutes of sentencing and the abstracts of judgment must be corrected. We agree with these concessions and remand as follows:

(1) Phipps's sentence for premeditated attempted murder (count 7) of seven years to life with a consecutive 10-year term for the gang enhancement, must be corrected to accurately reflect a sentence of life in state prison with a mandatory 15-year minimum parole period pursuant to section 186.22, subdivision (b)(5);

(2) Because we reverse Wilson's attempted murder conviction on count 7 for insufficient evidence and reverse the sentence (see discussion, *ante*, pt. III.D), the conceded error in his sentence is moot; and

(3) Wilson's abstract of judgment must be corrected to reflect that he and Phipps are jointly and severally liable for the $540 restitution award for the robbery of Andy's Market (count 1). We assume the minutes of resentencing and the new abstracts of judgment shall reflect the accurate sentence on count 7 for Phipps and accurately reflect Wilson's restitution award on count 1.

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[32] For the same reasons, we reject Wilson's alternative argument that his convictions on count 2 or 4 should be reversed because he possessed the same gun during the two robberies, and there was no evidence of a break between his possession of the gun.

4. At resentencing, the trial court shall reduce the sentence enhancement imposed on count 7 from 25 years to life for personal and intentional discharge of a firearm resulting in great bodily injury of death (§ *12022.53, subds.* (*d*), (*e*)) *to the lesser included enhancement of 20 years for personal discharge of a firearm* (§ *12022.53, subds.* (*c*), (*e*)).

Defendants argue, and the People concede, there is insufficient evidence in the record to support the enhancements for personal and intentional discharge of a firearm resulting in great bodily injury or death, imposed on defendants' convictions for attempted murder (count 7), because Marcus was not hit by the gunfire and, therefore, he did not suffer great bodily injury or death. (§ 12022.53, subds. (d), (e).) However, the People argue the remedy is not to order the trial court to strike the enhancements entirely, but to order the trial court to reduce the enhancements to the lesser included enhancements for personally discharging a firearm under section 12022.53, subdivisions (c) and (e). According to the People, the first amended information provided defendants with adequate notice they were subject to enhancements for personal discharge of a firearm by a principal based on the gang enhancement allegations.

Defendants concede the People's suggested remedy has ample support in published decisions. (See, e.g., *People v. Morrison* (2019) 34 Cal.App.5th 217, 222-223; *People v. Fialho* (2014) 229 Cal.App.4th 1389, 1395-1399.) But, piggybacking on their argument about inadequate notice of the firearm enhancements on counts 5 through 8, defendants oppose the application of the remedy in this case claiming they did not receive adequate notice of the lesser included enhancement either. Because we reverse Wilson's

conviction and sentence on count 7 (see discussion, *ante*, pt. III.D), his claim of sentencing error on that count is moot. As for Phipps, his fallback argument fails because we have already rejected his claim that he did not receive fair notice he would be subject to the enhancements he challenges on appeal. (See discussion, *ante*, pt. III.F.1.) The first amended information and jury instructions provided Phipps with fair notice he was subject to the greater *and* lesser included firearm enhancements for personally discharging a firearm.

5. At resentencing, the trial court shall decide in the first instance, whether to exercise its new discretion to strike enhancements for use of a firearm.

Defendants contend they are entitled to a remand for consideration of the newly authorized discretion to strike firearm use enhancements. Effective January 1, 2018, section 12022.5 was amended to provide: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.5, subd. (c), added by Stats. 2017, ch. 682, § 1, Sen. Bill No. 620 (2017-2018 Reg. Sess.).)

The People concede, correctly, this ameliorative amendment applies to defendants' nonfinal judgments. (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1079-1080.) However, the People argue we need not remand for consideration of the new discretion to strike firearm enhancements because the record demonstrates the trial court would not have exercised that discretion had it been available when the court first sentenced

defendants. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) But we are already remanding for resentencing on some counts. We express no opinion whether defendants are suitable candidates for relief under the amended statute and, on remand, the trial court shall independently consider whether to exercise its discretion to strike one or more of the firearm use enhancements.

6. At resentencing, the trial court shall decide in the first instance whether to exercise its discretion to strike Wilson's prior serious felony enhancement.

In a second supplemental respondent's brief, the People concede recent amendments to sections 667 and 1385, effective January 1, 2019, apply retroactively to Wilson's nonfinal judgment and grant the trial court discretion to strike Wilson's five-year sentence enhancement based on his having suffered a prior serious felony. The People also concede a remand is necessary for the trial court to consider whether to exercise that discretion. We agree with the People's concession.

"On September 30, 2018, the Governor signed Senate Bill [No.] 1393 which, effective January 1, 2019, amends sections 667[, subdivision] (a) and 1385[, subdivision] (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the . . . versions of these statutes [applicable when the crimes in this case occurred and at sentencing], the court [was] required to impose a five-year consecutive term for 'any person convicted of a serious felony who previously has been convicted of a serious felony' (§ 667[, subd.] (a)), and the court ha[d] no discretion 'to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under

Section 667.' (§ 1385[, subd.] (b).)" (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) In *Garcia*, this court, after applying the retroactivity rule set forth in *In re Estrada* (1965) 63 Cal.2d 740 and its recent Supreme Court progeny, concluded the Legislature intended the amendments to sections 667 and 1385 "to retroactively apply to the fullest extent constitutionally permissible—that is, to all cases not final when the statute becomes effective." (*Garcia*, at p. 972.)

Because the amendments to sections 667 and 1385 apply retroactively to Wilson, when the trial court resentences him it shall decide in the first instance whether to exercise its discretion to strike Wilson's five-year serious felony enhancement. (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i).)[33]

G. Cumulative Error.

Finally, defendants contend the cumulative effect of the errors committed by the trial court deprived them of a fair trial and warrants a complete reversal. We disagree. "Although we have found a few isolated instances of error in defendant[s'] trial, we do not believe they affected its fairness either individually or taken together. Defendant[s] [were] entitled to a fair trial, not a perfect one." (*People v. Cain* (1995) 10 Cal.4th 1, 82, citing *People v. Mincey* (1992) 2 Cal.4th 408, 454.)

[33] The People do not argue in the context of the trial court's new discretion to strike prior serious felony enhancements that a remand is unnecessary because the record clearly indicates the trial court would not have stricken the prior had it possessed the discretion to do so when it originally sentenced Wilson.

IV.

DISPOSITION

Wilson's conviction for attempted murder (count 7) is reversed.

Phipps and Wilson's convictions for shooting an occupied motor vehicle (count 5) are reversed. The People may elect to retry defendants. However, if the People fail to bring defendants to a new trial in a timely manner (see § 1382, subd. (a)(2)), our remittitur shall be deemed to modify the verdicts by reducing the convictions from shooting at an occupied motor vehicle to grossly negligent discharge of a firearm, and the trial court shall promptly resentence them.

On remand, the trial court shall correct Phipps's abstract of judgment to reflect a sentence on count 7 of life in state prison with a mandatory minimum parole period of 15 years. The trial court shall reduce Phipps's firearm enhancement on count 7 from 25 years to life to 20 years for personal discharge of a firearm.

The court shall correct Wilson's abstract of judgment to accurately reflect that he and Phipps are jointly and severally liable for the restitution order for count 1.

At resentencing, the trial court shall decide in the first instance whether to exercise its discretion to strike any firearm use enhancements or to strike Wilson's five-year sentence enhancement for having suffered a prior serious felony conviction.

In all other respects, the judgments are affirmed.

McKINSTER
Acting P. J.

We concur:

MILLER
J.

RAPHAEL
J.